

Arbitration and The U.S. Supreme Court: A Plea for Statutory Reform

THOMAS E. CARBONNEAU*

I. INTRODUCTION

Arbitration has long provided a pragmatic alternative to court proceedings—to the formality, delays, financial onus, and generally destructive effects of full-blown litigation. Generally, the recourse to arbitration reflects a desire to pursue more rational and workable dispute resolution goals than those proffered by adversarial litigation.¹ It is a commonplace remedy in domestic labor and commercial disputes; it is also used frequently to resolve claims arising from international contracts.² In these specialty areas, arbitration acts as an adjudicatory means of maintaining “industrial peace” and commercial relations.

This Article argues for stabilizing and preserving arbitration’s necessary and valuable vocation in dispute resolution. It outlines the basic

* Professor of Law and Director, Eason-Weinmann Center for Comparative Law, Tulane University School of Law. Diplôme, Université de Poitiers; A.B., Bowdoin College; M.A., Oxford University; J.D., M.A., University of Virginia; LL.M., J.S.D., Columbia University.

I am indebted to a number of colleagues for their comments on the manuscript. I gratefully acknowledge the kind contributions of Paul Barron, Florian Bartojsc, Friedrich Juenger, Terry O’Neill, and especially Robert Hillman. Any errors or omissions remain my exclusive responsibility.

1. The selection of arbitration in an arms-length setting evidences confidence in human rationality, the capacity to achieve compromise, and, more generally, a stance for more far-reaching dispute resolution goals. Although it remains an adjudicatory mechanism, arbitration in this sense, is akin to mediation in its guiding principle. It is meant to provide a flexible dispute resolution framework that yields informed, fair, and binding determinations. By their agreement to arbitrate, the parties are seeking not only a fair and measured resolution of their conflict, but also to establish and maintain a basis for constructive interaction in the midst of dispute and in its aftermath. Because they control the process, it is the parties who select knowledgeable adjudicators and determine procedural and normative ground rules. Arbitration allows the parties to assume responsibility for and exercise basic governance over their adjudicatory destiny.

2. For a discussion of labor and commercial arbitration, see sources cited *infra* note 30. The value of arbitration in the resolution of international contract claims is well-established. See, e.g., G. DELAUME, *THE LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS* chs. 9 & 10 (1988), reviewed in 63 TUL. L. REV. 957 (1989). The recent free trade agreement between Canada and the United States illustrates how arbitration also may be useful in resolving international trade conflicts between sovereign nations. See, e.g., Symposium, *Alternative Dispute Resolution In Canada-United States Trade Relations*, 40 ME. L. REV. 223 (1988)—in particular, Trakman, *Privatizing Dispute Resolution Under the Free Trade Agreement: Truth or Fancy*, 40 ME. L. REV. 223, 349 (1988).

stages in the evolution of the American law of arbitration³ and studies the underlying motivation of each of its historical phases. It attributes vital significance to the legislative and decisional law developments that led to an early rehabilitation of arbitration⁴ in American law, beginning with the enactment of the United States Arbitration Act (FAA)⁵ in 1925 and continuing with the ratification of the New York Arbitration Convention⁶ and the elaboration of a "hospitable" federal caselaw.⁷ Eventually, these developments gave rise to a law of arbitration with truly national dimensions that also embraced the ideals of international comity.⁸

In contemporary times—the golden age of American arbitration law—the unwieldy character of the "emphatic federal policy"⁹ that sustains the contractual recourse to arbitration, however, has placed arbitra-

3. On the history of American arbitration law, see F. KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* (1948); T. OEHMKE, *COMMERCIAL ARBITRATION* §§ 2:3, 2:4 (1987); de Seife, *A Brief History of Arbitration*, in M. DOMKE, *COMMERCIAL ARBITRATION* §§ 2:04, 2:05 (1987). See also Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 45-53, 65-77 (1984) [hereinafter *Arbitral Adjudication: A Comparative Assessment*]; Holtzmann, *U.S.A.*, 9 Y.B. COM. ARB. 60 (1984); Holtzmann, *United States*, 2 Y.B. COM. ARB. 116 (1977).

4. For a detailed account of these developments from a comparative law perspective and in the context of discussing other facets of arbitration law, see Carbonneau, *L'Arbitrage En Droit Américain*, 1988 REVUE DE L'ARBITRAGE [REV. ARB.] 3; Carbonneau, *L'Arbitrage Devant Les Cours Américaines*, 1989 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 653; Carbonneau, *American and Other National Variations on the Theme of International Commercial Arbitration*, 18 GA. J. INT'L & COMP. L. 143 (1988) [hereinafter *National Variations*]; Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263 (1988) [hereinafter *Reception of Arbitration*]. See also *infra* text accompanying notes 28-48.

5. The Act is commonly referred to as the Federal Arbitration Act, ch. 213 §§ 1-15, 43 Stat. 883-886 (1925) (current version at 9 U.S.C. §§ 1-14 (1982)). For a discussion of the significance of the FAA at the time of its enactment, see Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. 238 (1930); Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153 (1925); Note, *Contracts—Effect of the United States Arbitration Act*, 25 GEO. L.J. 443 (1937). For more recent treatments, see Healy, *An Introduction to the Federal Arbitration Act*, 13 J. MAR. L. & COM. 223 (1982); Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137 (1986).

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (codified at 9 U.S.C. §§ 201-208 (1982)). The United States ratified the Convention in 1970. For a comprehensive discussion of the Convention, see A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* (1981).

7. See *infra* text accompanying notes 29-30, 34-73.

8. See, e.g., *Reception of Arbitration*, *supra* note 4, at 272-79.

9. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

ARBITRATION AND U.S. SUPREME COURT

tion in a precarious position. The judicial doctrine on arbitration¹⁰ has exceeded the perimeters of its initial rehabilitative enterprise and has given arbitration a virtually unlimited authority in dispute resolution.¹¹ As recent developments make painfully clear, the United States Supreme Court's doctrine on arbitration is on a tragic course that threatens to undermine the integrity of the arbitral process.¹²

The Court's touting of arbitration is the centerpiece of its campaign to champion alternative dispute resolution [ADR]. Because both arbitration and adversarial litigation eventually result in settlement, and arbitration is a private remedy that offers little opportunity for appeal, the Court appears determined to send disputing parties to arbitration whenever possible and whatever the circumstance. The Court favors arbitration because it can lighten judicial caseloads while not expressly denying access to justice. The Court's endorsement of arbitration began quietly, lurking for sometime in the shadows of its opinions on international trade and commerce. The Court's position was articulated initially in the landmark cases of *Bremen v. Zapata*¹³ and *Scherk v. Alberto-Culver*¹⁴ and most recently reiterated in *Mitsubishi v. Soler*.¹⁵ In the domestic caselaw that followed, the boundaries between judicial and arbitral jurisdiction became dangerously blurred. In *Shearson/American Express, Inc. v. McMahon*¹⁶ and *Rodriguez de Quijas v. Shearson/American Express, Inc.*,¹⁷ the Court eviscerated the inarbitrability defense, making disputes over statutory rights and contract claims equally submissible to arbitration.

These latter developments are not completely devoid of merit. The essential features of arbitration—the exercise of adjudicatory self-determination, the use of flexible and expeditious procedures, and the provision for fair, informed, and binding determinations—need to be integrated into the current dispute resolution process. These objectives, in fact, are the principal goals of the ADR reformist movement. The Court's doctrine on arbitration, however, ignores the potential perils of and the need to regulate the arbitral process. In particular, the broad and unbending character of the federal judicial policy on arbitration prevents the Court from assessing the parties' reasonable expectations in agreeing to arbitrate. In addition to rapid proceedings and expert determinations, do the

10. See *infra* text accompanying notes 20-33.

11. See *infra* text accompanying notes 49-73.

12. See *infra* text accompanying notes 74-128.

13. 407 U.S. 1 (1972).

14. 417 U.S. 506 (1974).

15. 473 U.S. 614 (1985).

16. 482 U.S. 220 (1987).

17. 109 S. Ct. 1917 (1989).

parties want in all cases to eliminate completely judicial review, to limit all legal safeguards, and to submit to unlimited arbitrator discretion on the merits? The flaws in the Court's doctrine are most in evidence in *McMahon* and *Rodriguez*, where the Court upheld arbitration agreements in undeniably adhesionary circumstances. In these cases, the Court assumes erroneously that coercing consumers to arbitrate will bring about rationality in dispute resolution and lead parties to embrace an ethic of sensible accommodation.

The critical question addressed in this Article is whether arbitration can be rescued from judicial liberality and the misconceptions that accompany it. Can some measure of balance (and, thereby, basic credibility) be restored to the American law of arbitration? The legitimation of arbitration needs to find its proper place among important juridical interests. Sensible modifications are possible. The Court, for example, has given greater vitality to the inarbitrability defense in matters of labor arbitration without imperilling the important function of arbitration in resolving labor conflicts.¹⁸ Determinations by labor arbitrators regarding claims based upon statutory rights do not necessarily preclude an eventual judicial ruling, presumably because such rights are part of fundamental legislative guarantees that transcend the context of collective bargaining agreements.¹⁹ Such a restrained but meaningful judicial role is indispensable to the general operation and destiny of arbitration in other fields.

The Court's current conception of arbitration, however, is the antithesis of studied consideration and moderation. Both *McMahon* and *Rodriguez* attest to the Court's unflinching stance on the issue of arbitrability in nonlabor matters. The tenor of the current decisional law makes it unlikely that the Court will fashion for itself and other federal courts an authority sufficient to make necessary corrections when the arbitral process becomes unruly or overextended. An intelligent ordering of arbitration, therefore, can only proceed from a legislative reformation of the enabling statute.

At the beginning of the century, the enactment of the FAA remedied court aversion to arbitration's would-be infringement of judicial jurisdictional prerogatives. By an ironic twist of history, at the end of the century, amending the FAA may be necessary to moderate unfettered judicial enthusiasm for arbitration. An effective inarbitrability defense and a statutory definition of the scope of arbitrator adjudicatory powers are a traditional part of arbitration laws and are necessary to the proper func-

18. See *infra* note 141 and accompanying text.

19. See *id.*

tioning of arbitration in the American or any other legal system. The failure to maintain appropriate boundaries between public and private adjudicatory authority risks making arbitration, expanded to cover a broader range of issues and increasingly distanced from its original design, an institution of abuse, discrediting it as an adjudicatory mechanism. Accordingly, the Article closes with recommendations for amending the FAA.

II. ARBITRATION AND THE LITIGATION CRISIS

Contemporary skepticism about the social worth of litigation practices has sparked an eruption of interest in alternative forms of dispute resolution.²⁰ While empiric accounts depict the substantial costs of the adver-

20. The idea of alternative dispute resolution [ADR] has attracted the interest of Congress (see, e.g., 132 CONG. REC. S1009 (daily ed. Feb. 5, 1986) (statement of Sen. McConnell); *Legislative Developments: Testimony Before the Senate Judiciary Committee on the Administrative Dispute Resolution Act of 1988*, 43(3) ARB. J. 19 (1988)), journalists (see, e.g., Anderson, *U.S. Has Become a Nation of Lawsuits*, Wash. Post, Jan. 25, 1985, at B8, col. 5), and—according to pollsters—the general public (see, e.g., Lou Harris poll in 1 MEALEY'S LITIG. REPS. NAT'L TORT REF. 1647 (Mar. 1987)).

Courses on ADR are becoming popular in law school curricula. West Publishing Company reports that "164 law schools are now offering one or more courses on Alternate Dispute Resolution." See 42 LAW SCHOOL NEWS (Feb. 1990). There are already several teaching texts in the area. See S. GOLDBERG, E. GREEN, & F. SANDER, *DISPUTE RESOLUTION* (1985); L. KANOWITZ, *ALTERNATIVE DISPUTE RESOLUTION CASES AND MATERIALS* (1986); J. MURRAY, A. RAU, & E. SHERMAN, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (1989); L. RISKIN & J. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987); N. ROGERS & R. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* (1987). See also P. STEIN, *LEGAL INSTITUTIONS: THE DEVELOPMENT OF DISPUTE SETTLEMENT* (1984).

The legal literature on the topic has grown to voluminous proportions. See, e.g., Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 DRAKE L. REV. 483 (1986-87); Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982); Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Fleming, *Reflections on the ADR Movement*, 34 CLEV. ST. L. REV. 519 (1986); Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective*, 37 RUTGERS L. REV. 337 (1985); Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 ARIZ. ST. L.J. 3 (1986-87); Gilkey, *Alternative Dispute Resolution: Hazardous or Helpful?*, 36 EMORY L.J. 575 (1987); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1986); Sipes, *Reducing Delay in State Courts—A March Against Folly*, 37 RUTGERS L. REV. 299 (1985); Thensted, *Litigation and Less: The Negotiation Alternative*, 59 TUL. L. REV. 76 (1984).

But see POLITICS OF INFORMAL JUSTICE (R. Abel ed. 1981), reviewed in 34 J. LEGAL EDUC. 334 (1984); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know [And Think We Know] About our Allegedly Contentious and Litigious Soci-*

sarial ethic and engender questions about its continued viability, doctrinal studies attack the integrity and moral foundation of adversarial justice.²¹ The myths that sustain the hold of the adversarial principle upon American society are being assailed and countermanded. Secular canons are finally beginning to penetrate into the American religion of law. The views that the courtroom is the house of God and lawyerly sparring the only means of incanting certain truth are yielding to more sober and realistic perceptions. The new social theology of adjudication posits humanistic values and the resources of the human spirit as the essential pillars of the dispute resolution edifice.²² The reference to such

ety, 31 UCLA L. REV. 4 (1983); Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) [hereinafter *Against Settlement*]; Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Galanter, *The Legal Malaise; or, Justice Observed*, 19 L. & Soc'y REV. 537 (1985); Civiletti, *Zeroing in on the Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40 (1986); Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239 (1987); McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985). See also *The Litigation Explosion Debate*, 11 JUST. SYS. J. 259 (1986).

Former Chief Justice Warren Burger was a strong proponent of ADR, especially of arbitration. See, e.g., Burger, *Today's Challenge: Improving the Administration of Justice*, 55(2) N.Y. ST. B.J. 7 (1983); *Time to Review our Reliance on Adversary System: Chief Justice Faults Lawyers for Frivolous Suits, Discovery Abuse*, (Address by Chief Justice Warren Burger at A.B.A. Midyear Meeting, Las Vegas, Feb. 1984), L.A. Daily J., Feb. 15, 1984, at 4, col. 3.

21. For statistical accounts of the impact of adversarial procedure upon divorce litigation, see Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 1119. More doctrinal evaluations of the adversarial ethic are contained in T. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS* chs. 1 & 7 (1989) [hereinafter T. CARBONNEAU, ADR].

22. The essential thesis of the book is that individuals should look primarily within themselves and to their own human resources to confront and resolve private law conflicts. Legal adjudicatory institutions are paralyzed by the intricacies and sophistication of their own processes. The analytical rigor of legal reasoning and the complex formalism of legal procedure are inadequate substitutes for individual rationality, personal understanding, and mutual cooperation in the quest to gain the civil resolution of conflictual circumstances. Antihumanistic both in its principle and in its practice, the adversarial ethic works a subterfuge on society. It is deceitful not only as to its concern for individual interests, but also in its regard for legality and the integrity of substantive law. To establish a more truthful and humane societal dispute resolution ethic, remedial mechanisms should transcend the simple containment of the destructive human feelings that accompany conflict and avoid their exploitation. The adjudicatory framework should respond to and develop the full range of feelings and perceptions experienced by people in conflict. The goals of social order and stability must be achieved through educational programs and the cultivation of humanistic priorities in adjudication. . . . The social contract for adjudication must be founded upon a collective consensus about the true potential and disposition of the human personality when it confronts disagreement.

ARBITRATION AND U.S. SUPREME COURT

principles, rather than to legal dogma, will produce—it is argued—not only more efficient but also better pathways to justice.

The present process for resolving civil disputes invites radical transformation. While they contain conflict in a minimalist sense, courtrooms and their attendant procedures have become the primary source of disputes in society, vehicles for the extension and exacerbation of social strife.²³ Moreover, American-style adversarial representation exacts more than a metaphorical pound of flesh. Single-minded posturing is a curious way of dancing to the score of mutuality and to the melody of settlement.²⁴ By emphasizing the integrity of legal rights, the judicial process ironically has made itself inaccessible to those persons who are least able and most need to assert their rights. While courts should serve a critical normative function, their ability to satisfy this task is being thwarted by the volume of claims.²⁵ The proponents of adversarial politics fear principled determinations and countenance only badgered settlements.

The reappraisal of procedural justice has created, concomitantly, a heightened judicial regard for arbitration. Generally, arbitral adjudication is perceived as a legitimate contractual means of achieving the ends of efficient and equitable adjudication. With the coerced acquiescence of their state counterparts,²⁶ federal courts have been disposed, however, not only to disregard traditional legal limitations upon the arbitral process, but also to redefine arbitration's institutional stature and expand considerably its general adjudicatory scope.²⁷

Since the enactment of the FAA,²⁸ the process of arbitration has basked in the warm sunshine of judicial approval.²⁹ As the contemporary

T. CARBONNEAU, ADR, *supra* note 21, at ix-x.

23. *See id.* at ch. 1.

24. For a discussion of the distinction between adversarial and nonadversarial settlement through negotiation, see, e.g., Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905; Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). *See generally* R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); R. FISHER & S. BROWN, GETTING TOGETHER: BUILDING A RELATIONSHIP THAT GETS TO YES (1988); D. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS (1989); H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983); Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985).

25. For a discussion of normative function of the courts and its relationship to ADR proposals, see, e.g., Fiss, *Against Settlement*, *supra* note 20.

26. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

27. *See Reception of Arbitration*, *supra* note 4, at 268-72.

28. *See supra* note 5 and accompanying text.

29. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,

preoccupation with the deficiencies of adversarial litigation grew, the approval has developed into a type of "courthouse effect," generating dramatic changes in the juridical climate surrounding arbitration. Judicial doctrine has uprooted arbitration from the specialty of labor and commercial disputes, magnifying its dispute resolution role and distorting its essential adjudicatory capability.³⁰ The lenses of external policy have colored the courts' perception of arbitration's basic mission and utility. The decisional law now portrays arbitral adjudication as a cure-all for American society's litigious woes, a magical remedy that will somehow silence the deeply disturbing questions raised by the foundering of the adversarial ethic.

At best, this depiction is fanciful and illusory—the work of a judiciary despairing of a rational solution. At worst, the redefinition of the adjudicatory status of arbitration is an exercise in deliberate misrepresentation.³¹ The "puffing" of arbitration is a ploy for achieving rudimentary efficiency in the practical administration of justice. Prior to its recent expansion, arbitration stood for adjudicatory efficiency, privacy, flexibil-

388 U.S. 395 (1967); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

30. For a discussion of arbitration in these specialized areas, see (on commercial arbitration) 1-5 J. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE* (1979); G. WILNER, *DOMKE ON COMMERCIAL ARBITRATION: THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* (1984); de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982); Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961). On labor arbitration, see B. AARON, *THE FUTURE OF LABOR ARBITRATION IN AMERICA* (1976); F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* (4th ed. 1985); O. FAIRWEATHER, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* (2d ed. 1983); M. HILL & A. SINICROPI, *REMEDIES IN ARBITRATION* (1981); S. KAGEL, *ANATOMY OF A LABOR ARBITRATION* (1st ed. 1978); C. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS* (3d ed. 1970); A. ZACK & R. BLOCH, *THE LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION* (1983).

31. To some extent, this argument parallels Fiss' view that the Court's support for ADR is a means by which it tends to support and implement a political philosophy of deregulation and anti-statism. See Fiss, *Against Settlement*, *supra* note 20. The argument advanced here, however, does not imply that the Court's doctrine is motivated by an underlying political conviction. The basic consensus among the justices on matters of arbitration suggests that such matters do not divide the liberal and more conservative members of the Court. Rather, their agreement suggests that the Court is using arbitration and the FAA as a means to help resolve the litigation crisis. The Court places no particular value in or evinces no particular understanding of arbitration as arbitration, but it sees arbitration as a useful vehicle by which to accomplish a practical design largely unrelated to arbitration. Although a commonplace feature of decisional law, this response to a practical concern through the guise of doctrine is confusing, perforce fraught with conceptual misunderstanding, and is likely to be substantially counterproductive in regard to the accomplishment of its objectives. The current decisional law on arbitration—notwithstanding its underlying motivation—illustrates circumstances in which this form of judicial pragmatism has gone awry. For more extensive discussion and greater qualification of this point, see *infra* text accompanying notes 79 and 120-24.

ARBITRATION AND U.S. SUPREME COURT

ity, and expertise among specialized groups.³² Because arbitration can achieve these ends in certain contexts, however, does not mean that it can or should do so in every circumstance. Although there may be a pressing need for efficient adjudicatory procedures, arbitration is not necessarily an appropriate mechanism for all forms of disputes. It cannot be or become what it is not. The courts' doctrine fails to account for and heed the basic features of arbitration's adjudicatory character: a form of private justice to which equally knowledgeable and similarly-positioned parties have agreed voluntarily, usually led to do so by the general mores of their professional community.³³

Group consensus has been critical to the success of arbitration in specialty fields. Commercial parties, for example, accept arbitration because it mirrors their basic disposition about the protection of commercial interests. There is, therefore, no reason to think that arbitration can be applied more comprehensively without a general reevaluation of society's adjudicatory ideology. Simply substituting one remedial process for another will not alter present all-or-nothing adversarial assumptions about dispute resolution or instill in parties an inclination toward conflict avoidance or sensible resolution.

In fact, more frequent recourse to arbitration in increasingly diverse settings coupled with a demand for greater attorney participation may make arbitration indistinguishable from its judicial counterpart. Parties forced to arbitrate will progressively require greater procedural protections, more extensive discovery, and greater reference to established legal norms. There is some evidence that indicates that the continuing use of arbitration in commercial matters has resulted in increasingly court-like proceedings. In some instances, three-member-panel arbitrations become "arbitrations within arbitrations" in which the neutral chair is pitted against the two disagreeing party-appointed arbitrators.

More than a mere substitution of adjudicatory processes must take place if effective change is to be achieved. The values that underpin procedural processes must be isolated and seriously scrutinized. Whether real or imagined, the litigation crisis has at least a symbolic significance: it represents a debate about the morality of human behavior in the circumstances of conflict and the legitimacy of institutional regulation to maintain social order. Real progress to a better adjudicatory day can be achieved when dispute resolution mechanisms cease to disguise the true source of conflict between parties and abdicate their exclusive preoccupa-

32. For a discussion of the role of arbitration in specialized contexts, see T. CARBON-NEAU, *ADR*, *supra* note 21, at chs. 3 & 4. See also *supra* notes 6 & 30 and accompanying text (sources cited).

33. See *id.*

tion with winning strategies. The Court needs to give the weight of its institutional prestige and proffer its guidance to a truly fundamental revolution in juridical values, rather than mangle the arbitral process to achieve a semblance of administrative efficiency in court dockets.

To the courts' credit, they have not attempted to extend arbitration beyond matters of economic regulation. There is no indication in the decisional law that civil rights or other constitutional law claims can or should be submitted to arbitration. Nonetheless, important rights and fundamental principles are at issue in the commercial realm. For example, antitrust regulation implements a basic political creed about economic organization; unwary consumers can be deprived of essential property rights by the business practices of large economic institutions; commercial transactions infected with fraud, duress, or overreaching demand public correction because the toleration of such conduct would amount to a transformation of our basic ethos as a society. Advancing arbitral relief as the exclusive remedial standard in the area of commercial regulation not only divests society of basic governance over such matters, but also it could result in the loss of the adjudicatory safeguards that proceed from a procedural process built upon public scrutiny, fairness, and a basic right of appeal—one which also entrusts socially divisive questions to an impartial and principled judiciary. The normative and procedural curtailment implied by the recourse to arbitration in economic regulatory matters may irreparably change our concept of political organization and of individual protection and rights.

Arbitral adjudication, therefore, is no more an answer to the current pathology of litigation than fundamentalist faith is to the pangs of existence. The ardor of metaphysical convictions cannot transform the irreversible contradictions of human life any more than a judicial command to arbitrate disputes can amend the difficulty of finding a dispute resolution framework that is at once efficient, rational, and just. In either setting, unbending belief yields only an abstract expectation of a different fate and camouflages the true difficulties. Both approaches stray from a necessary confrontation with a painstaking definition of core values. Moreover, as absolute religious convictions can imperil the general credibility of theology, the view that arbitration is a remedy of universal application and a panacea to the dilemma of litigation can discredit its ability to function effectively in more limited circumstances. Finally, the extremist refashioning of arbitration, as of religious beliefs, can lead to critical misunderstandings that could undermine arbitration and the possibility of finding a workable solution to the litigation crisis.

III. THE HISTORY OF ARBITRATION: THE DISTANCE BETWEEN DISTRUST, ACCEPTANCE, AND FEDERALIZATION

Following a pattern that prevailed in most legal systems,³⁴ the history of American arbitration law centers upon the juridical rehabilitation of the process. From an era of judicial distrust, legislative enactments carried arbitration into a golden age, a period in which arbitration was not only safeguarded from, but also protected by the courts.³⁵ Arbitration

34. For a discussion of the historical evolution of the law of arbitration in various legal systems, see Carbonneau, *Arbitral Adjudication: A Comparative Assessment*, *supra* note 3. See also 1 & 2 H. SMIT & V. PECHOTA, *THE WORLD ARBITRATION REPORTER* (1986).

35. In most contemporary statutory frameworks, courts are obligated not only to give arbitration agreements their jurisdiction effect, but also to lend the weight of their public authority to the arbitral process by designating arbitrators and compelling recalcitrant parties to arbitrate. Such statutes, therefore, establish a cooperative relationship and mutuality between the courts and arbitral proceedings. For an example of such legislation, see Decree No. 80-354 of May 14, 1980, 1980 J.O. 1238, reprinted in 1980 DALLOZ-SIREY, *LÉGISLATION* [D.S.L.] 207. Commentaries on the French legislation include: Carbonneau, *The Reform of the French Procedural Law on Arbitration: An Analytical Commentary on the Decree of May 14, 1980*, 4 HASTINGS INT'L & COMP. L. REV. 273 (1980-81); Delvolvé, *La réforme du droit de l'arbitrage: l'intervention du juge*, 1980 REV. ARB. 607; Loussouarn, *La réforme du droit de l'arbitrage: les voies de recours*, 1980 REV. ARB. 671; Robert, *La législation nouvelle sur l'arbitrage*, 1980 DALLOZ-SIREY [D.S.], *Chronique* No. 25, at 189. Although less comprehensive than its civil law analogue, the FAA adopts a similar approach on these matters. See *Reception of Arbitration*, *supra* note 4, at 268-71. See also *supra* note 5 and accompanying text. For a discussion of French statutory developments in international arbitration, see, e.g., Fouchard, *L'arbitrage international en France après le décret du 12 mai 1981*, 109 J. DR. INT'L-CLUNET 374 (1982).

Recent reforms in civil law codifications on arbitration, based in part upon the model established by the French legislation, have been enacted in the Netherlands, Switzerland, and Belgium. These enactments generally endorse the concept of "anational" arbitration and provide for a cooperative judicial-arbitral relationship. On December 1, 1986, the Netherlands replaced the arbitral provisions of the 1838 Code of Civil Procedure with a revised regulatory framework for arbitration. The Netherlands Arbitration Act added a new book to the Code of Civil Procedure, consisting of articles 1020-1076. These new provisions, although they are based upon the regulation of arbitration through a territoriality principle, constitute a liberal statement of policy regarding arbitration. The legislation recognizes the principle of party autonomy, attributes full effect to the arbitration agreement, establishes a cooperative relationship between judicial and arbitral tribunals, and provides limited means for challenging awards. See Schultsz, *Les nouvelles dispositions de la législation néerlandaise en matière d'arbitrage*, 1988 REV. ARB. 209; Van den Berg, *The Netherlands*, 2 INT'L HANDBOOK COM. ARB. § The Netherlands (Supp. 7, Apr. 1987); Van den Berg, *The Netherlands*, 12 Y.B. COM. ARB. 3 (1987).

On December 18, 1987, the Swiss Parliament enacted a law entitled the "Swiss Private International Law Act" that governs matters of international arbitration. The law contains a number of liberal provisions on arbitration, including one which recognizes the authority of arbitral tribunals to rule upon jurisdictional challenges. It generally gives effect to party choice and determination in matters of arbitration. See Briner, *Switzerland*, 2 INT'L HANDBOOK COM. ARB. § Switzerland (Sept. 1988); Blessing, *The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism*, 5(2) J. INT'L ARB. 9 (1988); Budin, *La nouvelle loi suisse sur l'arbitrage international*, 1988 REV. ARB. 51; *Swiss Government Approves International Statute*, 3 INT'L ARB. REP. 5 (Nov. 1988).

continues to flourish, but there is uncertainty about its ultimate destiny. Will this body of law continue to evolve in an historically dynamic way? Will the modern statutory rebirth of arbitration be followed by an inevitable regression to a darker age? Or, will it settle on a plateau of institutional equilibrium?

The United States Supreme Court holds both principal authority and the authority of principle as to the content of modern American arbitration law. Viewing the provisions of the FAA as a source of investiture,³⁶ the Court has proclaimed itself and all other federal courts the chief oracles of an inviolable "federal policy on arbitration,"³⁷ meant to validate and protect the contractual right to have recourse to arbitration.³⁸ In elaborating its doctrine, the Court has dutifully and, at times, with exuberant zeal implemented the basic tenets of the "legislatively-ordained" policy on arbitration.

The incipient problems of construction in the Court's decisional law centered upon federalism concerns: Should the provisions of the FAA remain enforceable in diversity cases where federal courts, under *Erie*,³⁹ ordinarily were obligated to apply state law? State statutes on arbitration could conflict with the FAA's general policy and specific content. Federalism questions also surfaced in litigation where state regulatory provisions mandated exclusive judicial recourse. In response to these potential problems, the Court simply declared that the application of the FAA did not encroach upon states' rights or infringe upon the integrity of state legislation.⁴⁰ Rather, the enactment and federal court implemen-

In Belgium, the law of March 27, 1985, modified article 1717 of the Judicial Code, limiting the authority of Belgian courts to set aside an international or foreign arbitral award. For purposes of asserting jurisdiction, the article requires that one of the implicated parties have Belgian nationality, reside in Belgium, or have a commercial presence in Belgium. See Matray, *Belgium*, 2 INT'L HANDBOOK COM. ARB. § Belgium (Supp. 8, Dec. 1987); Paulsson, *Arbitration Unbound in Belgium*, 2 ARB. INT'L 68 (1986); Van Houtte, *La loi belge du 27 mars 1985 sur l'arbitrage international*, 1986 REV. ARB. 28.

36. See, e.g., *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402, 404 (1967).

37. See, e.g., *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1982).

38. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10, 16 (1984).

39. 304 U.S. 64 (1938). For a discussion of the federalism implications of the FAA, see Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61 (1985); Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985); Kochery, *The Enforcement of Arbitration Agreements in the Federal Courts*; *Erie v. Tompkins*, 39 CORNELL L.Q. 74 (1953); Note, *Erie*, Bernhardt, and *Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 YALE L.J. 847 (1959). On federalism generally, see Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Field, *The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986).

40. See, e.g., *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1982); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

ARBITRATION AND U.S. SUPREME COURT

tation of the FAA represented nothing more nor less than the use of congressional authority to create rules of application for the federal judiciary.⁴¹ Federalism, therefore, was not, in the Court's mind, at issue. From a practical standpoint, however, state laws hostile to arbitration were rendered inapplicable in federal court decisions because they deviated from the congressional pronouncement on arbitration. The Court thereby gave a sacred national status to the FAA's basic commandment: that arbitration agreements are "valid, irrevocable, and enforceable."⁴²

Ironically, the Court interpreted the constitutional restraints on federal power to provide a basis for federalizing American arbitration law. The mainstay principles of federalization were that: (1) in diversity cases, federal courts applied the FAA even if a state law, antagonistic to arbitration, governed other aspects of the case;⁴³ (2) the Court viewed such a determination as upholding Congress' power to create rules for the federal courts, rather than as a contravention of the applicable state legislation;⁴⁴ (3) the Commerce Clause enabled Congress to enact appropriate legislation for interstate commerce;⁴⁵

41. See, e.g., *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

42. See FAA, *supra* note 5, § 2. See also *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1982). For commentaries upon the "trilogy" cases, see Comment, *Commercial Arbitration: Southland Corp. v. Keating—Section 2 of the Federal Arbitration Act Preempts State Law in the Field of Commercial Arbitration*, 10 J. CORP. L. 767 (1985); Comment, *Dean Witter Reynolds, Inc. v. Byrd: The Unraveling of the Intertwining Doctrine*, 62 DEN. U.L. REV. 789 (1985); Note, *Federal Preemption—Arbitration—Federal Arbitration Act Creates National Substantive Law Applicable in Federal and State Courts and Supercedes Contrary State Statutes*, 64 MISS. L.J. 561 (1984); Note, *Investor-Broker Arbitration Agreements: Dean Witter Reynolds, Inc. v. Byrd*, 20 U.S.F. L. REV. 101 (1985); Note, *Mixed Arbitrable and Nonarbitrable Claims in Securities Litigation: Dean Witter Reynolds, Inc. v. Byrd*, 34 CATH. U.L. REV. 525 (1985); Note, *Preemption of State Law Under the Federal Arbitration Act*, 15 U. BAL. L. REV. 128 (1985); Recent Developments, *The Federal Arbitration Act: A Threat to Injunctive Relief*, 21 WILLIAMETTE L. REV. 674 (1985).

The federalization issue has also been raised, albeit indirectly, in regard to the law relating to choice of forum clauses. Similar results have been obtained. See *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988). See also Case Comment, *Forum-Selection Clauses: Should State or Federal Law Determine Validity in Diversity Actions?* - *Stewart Organizations, Inc. v. Ricoh Corp.*, 108 S.Ct. 2239 (1989), 64 WASH. L. REV. 439 (1989). Also, the Court has recently ruled on a case that posed the "trilogy" question somewhat in reverse. Given the contractual character of arbitration and party autonomy, can parties opt out of the FAA by agreeing to abide by state arbitration laws? See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 109 S. Ct. 1248 (1989). For an analysis of this case, see *infra* text accompanying notes 102-124.

43. See, e.g., *Prima Paint v. Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

44. See *id.*

45. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

(4) as a consequence, state legislation precluding the recourse to arbitration—even in regulatory areas—was unconstitutional under the Supremacy Clause of the federal constitution;⁴⁶ and

(5) as a further result, both state and federal courts were obligated to apply the FAA.⁴⁷

These interpretive rulings quickly became tenets of infallible dogma. A more limited doctrine, in the Court's view, would have impaired the federal legislation's substantive scope and impeded the achievement of its policy goal.⁴⁸

A. *Arriving at the Apogee of Judicial Liberalism*

On its own, the federalization of American arbitration law neither redefined arbitration nor modified its adjudicatory mission. By blocking hostile state statutes, federalization merely achieved uniformity in the statutory regime governing arbitration. The Court, however, had a more ambitious aim. Its uncompromising view of the policy underlying the FAA became a vehicle for transforming arbitration. The strength and the importance given to this view gave rise to a basic, but critical concern: Given the reach of the federal law and the cohesion of federal judicial support, did the emerging doctrine on arbitration tolerate any legal limitations? Otherwise stated: Did the progressive elimination of federalism restraints portend a judicial doctrine that also ignored other fundamental juridical concerns?

The evolution of the decisional law on the question of whether arbitrators can lawfully award or be empowered to award punitive damages illustrates the problem and its potential dangers. Prior to the recent surge of judicial liberalism in regard to arbitration, the settled rule was that the contractual nature of arbitration did not establish a sufficient jurisdictional basis to allow arbitrators to award such damages.⁴⁹ Puni-

46. *See id.*

47. *See id.* at 16-17.

48. *See id.*

49. *See* Garrity v. Lyle Stuart, Inc., 40 N.Y. 2d 354, 353 N.E. 2d 793, 386 N.Y.S. 2d 831 (1976). On this question, *see generally* Bedell, *Punitive Damages in Arbitration*, 21 J. MARSHALL L. REV. 21 (1987); Berg, *Punitive Damages: Are They Properly Awarded in Arbitration?*, 1 INT'L ARB. REP. 248 (1986); Jones, *Punitive Damages in Arbitration in the USA*, 14 INT'L BUS. LAW. 188 (1986); Note, *Punitive Damages in Arbitration: The Search for a Workable Rule*, 63 CORNELL L. REV. 272 (1978); Note, *The Arbitrator's Power to Award Punitive Damages in International Contract Actions*, 19 N.Y.U. J. INT'L L. & POL. 203 (1986); Note, *The Award of Punitive Damages as a Public Policy Question—Garrity v. Lyle Stuart, Inc.*, 43 BROOKLYN L. REV. 546 (1976); Comment, *The Scope of Modern Arbitral Awards*, 62 TUL. L. REV. 1113 (1988); Shell, *The Power to Punish: Authority of Arbitrators to Award Multiple Damages and Attorney's Fees*, 72 MASS. L. REV. 26

ARBITRATION AND U.S. SUPREME COURT

tive damages represented the imposition of a legal sanction, a form of retribution for grossly deviant conduct, that was anchored in the courts' public adjudicatory authority and responsibility.⁵⁰ While they could determine and award ordinary damages, private adjudicators, invested with authority by contract, could not exercise public jurisdictional powers and order extraordinary legal relief. The need to equiparate judicial and arbitral tribunals, demanded by the emerging "emphatic federal policy" on arbitration,⁵¹ gradually led to the elimination of this restriction upon arbitrators. Despite some inconsistency in the caselaw,⁵² the majority posi-

(1987); Stipanowicti, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U.L. REV. 953 (1986).

50. The New York Court of Appeals in *Garrity* held that arbitrators could not award punitive damages even if the parties had authorized them to do so in their agreement because punitive damages are meant to punish parties and deter negative social conduct, not compensate disappointed contractants. Fearing an unwarranted intrusion upon public functions and state authority, the court held:

Punitive damages is a sanction reserved to the State, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention. Since enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, an arbitrator's award which imposes punitive damages should be vacated.

353 N.E.2d 793, 794.

51. See *supra* note 9 and accompanying text.

52. The position of the federal courts on the question of the arbitral award of punitive damages is in striking contrast to the reasoning in *Garrity* and aligns itself with the general tenor and logic of the second trilogy. In *Willoughby Roofing & Supply Co. v. Kajima Int'l*, 598 F. Supp. 353 (N.D. Ala. 1984), the court found that the arbitrators had the authority to award punitive damages pursuant to a broad arbitral clause (allowing the arbitrators to entertain "all claims, disputes, and other matters in questions arising out of, or relating to, this agreement . . . or the breach thereof") and wide-ranging institutional rules ("The arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties."). The court held, "[o]nly in the presence of 'clear and express exclusions' could it be said that the arbitrators lacked authority under the contract to consider the plaintiff's claims for punitive damages." 598 F. Supp. 353, 358. The holding reflects the view that the federal policy favoring arbitration (and its institutional and juridical autonomy) requires allowing arbitrators to fashion the remedies they deem appropriate in the particular case. See also *Raytheon Co. v. Automated Business Sys., Inc.*, 882 F.2d 6 (1st Cir. 1989) (federal appellate court rejects state court position that arbitrators can never grant punitive damages; also rejects view that express authorization is necessary for arbitrators to award punitive damages [position espoused by California state court]; held that general arbitral clause that incorporates rule authorizing any just relief is sufficient authority).

See also *Willis v. Shearson/American Express, Inc.*, 569 F. Supp. 821 (D.C. N.C. 1983) (This court agrees that there is no public policy bar which prevents arbitrators from considering claims for punitive damages.); *Rogers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (state court agrees that claims for punitive damages are arbitrable) (N.C. App. 1985), *cert. denied*, 315 N.C. 590, 341 S.E.2d 29 (1986); *Grissom v. Greener & Sumner Constr., Inc.*, 676 S.W.2d 709 (Tex. Ct. App. 1984) (upholding arbitrability of punitive damages where arbitration agreement expressly conferred authority on arbitrators to consider exemplary damages; further, such awards did not violate public policy in contractual disputes); *Baker v. Sadick*, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984) (upholding validity of punitive damage awards in medical malpractice arbitration); *Belko*

tion is now that contracting parties have the right to authorize arbitrators to award punitive damages and, impliedly, such authority is part of the arbitral tribunal's ordinary jurisdictional powers and need not be expressly conferred by the parties.⁵³ The fate of the restriction on the award of punitive damages, therefore, indicated that significant legal interests (other than federalism concerns) could succumb to the torrential policy imperative that underpinned the federal legislation on arbitration.

As a modern arbitration statute, the FAA clearly favors and facilitates the contractual recourse to arbitration.⁵⁴ It provides limited opportunities for judicial correction of the process. For example, courts can intervene in arbitral proceedings only to render necessary procedural assistance;⁵⁵ they are obligated to recognize and give jurisdictional effect to valid arbitration agreements;⁵⁶ and judicial supervision of awards can be exercised only in highly circumscribed instances.⁵⁷ Because the public policy defense applies only to the enforcement of labor arbitration awards,⁵⁸ the "common law" exception of inarbitrability⁵⁹ is the sole means for assert-

v. AVX Corp., 251 Cal. Rptr. 557, 204 Cal. App. 3d 894 (Cal. App. 1988) (upholding award of punitive damages given parties' express authorization).

There is a division of authority among the courts on this question in matters of labor arbitration. See *Safeway Stores, Inc. v. International Assoc. of Machinists & Aerospace Workers*, 534 F. Supp. 638 (D.C. Md. 1982) (disallowing punitive damages); *Baltimore Regional Joint Bd. v. Webster Clothes, Inc.*, 596 F.2d 95 (4th Cir. 1979) (holding that arbitrator's award of punitive damages exceeded authority granted by collective bargaining agreement); *Sweeney v. Morganroth*, 451 F. Supp. 367 (S.D. N.Y. 1978) (upholding an arbitral award for "liquidated" damages, "recognizing the substantial leeway which must be granted an arbitrator in fashioning remedies, especially in labor-related disputes . . ."); *Local 369, Bakery & Confectionary Workers Int'l Union of America v. Cotton Baking Co.*, 514 F.2d 1235 (5th Cir. 1975) (allowing award of punitive damages as being within arbitrator's discretion). See also *Westmoreland Coal Co. v. United Mine Workers of Am., Int'l Union*, Dist. 28, 550 F. Supp. 1044 (W.D. Va. 1983); *Westinghouse Elec. Corp., Aerospace Div. v. International Bhd. of Elec. Workers*, 561 F.2d 521 (4th Cir. 1977); *International Union of Operating Eng'rs Local No. 450 v. Mid-Valley, Inc.*, 347 F. Supp. 1104 (D.C. Tex. 1972); *School Comm. of New Bedford v. New Bedford Educators Ass'n*, 9 Mass. App. Ct. 793, 405 N.E.2d 162 (1980); *U.S. Fidelity & Guar. Co. v. DeFluiter*, 456 N.E. 2d 429 (1983); *Shaw v. Kuhnelt & Assoc.*, 102 N.M. 607, 698 P.2d 880 (1985); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (1988).

53. See generally text accompanying *supra* note 52.

54. See *National Variations*, *supra* note 4.

55. FAA, *supra* note 5, §§ 5 & 7.

56. *Id.* at §§ 3 & 4.

57. *Id.* at § 10.

58. See *Reception of Arbitration*, *supra* note 4, at 269 n.27.

59. The public policy defense allows a court to vacate an arbitral award because the content of the award, in the court's assessment, violates a fundamental legal stricture of the jurisdiction. As in other areas of legal regulation, public policy is a concept of wide latitude and potentially limitless extension. It can include matters of both substance and procedure. There is a general consensus that it refers to core considerations, and thus it is basically impossible to define with any specificity except in an ad hoc fashion. It is not used with any frequency (if at all) in the arbitration context, except in regard to labor arbitration awards.

ARBITRATION AND U.S. SUPREME COURT

ing the application of substantive legal requirements and policy interests in the arbitral process.⁶⁰ For example, in the civil setting, matters of status and capacity (whether a person is single, married, or divorced) cannot be submitted to arbitration because these questions implicate public policy. An agreement to arbitrate or an award ruling upon legal status accordingly would be unenforceable because the subject matter is inarbitrable. The inarbitrability defense, therefore, maintains a critical balance between vital juridical interests and the autonomy and operation of the arbitral process.

Notwithstanding its well-established, essential role, the inarbitrability defense—like the restriction on punitive damages—has not withstood the onslaught of the judicial doctrine on arbitration. The signs of its eventual collapse first became visible in litigation relating to international commercial arbitration. In two landmark cases, *Scherk v. Alberto-Culver*⁶¹ and *Mitsubishi v. Soler*,⁶² the Court held that claims pertaining to se-

See supra note 58 and accompanying text. *See generally* Meltzer, *After the Labor Arbitration Award: The Public Policy Defense*, 10 IND. REL. L.J. 241 (1988); Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981); Note, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving Grace in the Search for a Well-Defined Public Policy Exception*, 42 U. MIAMI L. REV. 767 (1988). The public policy defense is also available against international arbitral awards under the New York Arbitration Convention. It is invoked infrequently and with little success in this context. *See, e.g.,* *Geotech Lizenz v. Evergreen Sys., Inc.*, 697 F. Supp. 1248 (E.D. N.Y. 1988).

Inarbitrability both overlaps with public policy and is a more narrow and hence more definable ground by which to oppose the enforcement of arbitral awards. Like the public policy defense, it is not expressly codified in the FAA grounds for vacating awards, but it is specifically included in article V of the New York Arbitration Convention. It is also part of the traditional law of arbitration and, therefore, has standing as a "common law" principle. It refers to the requirement that the subject matter of the arbitration agreement or award not relate to matters that involve the enforcing jurisdiction's public policy and be legitimately submissible to arbitration. Arbitrable subject matters are those which fall within the ambit of contractual discretion. For a discussion of the concept of arbitrability, see G. WILNER, *supra* note 30, at 12:00-13:12.

60. The FAA applies only to transactions in maritime and commercial matters. *See* FAA, *supra* note 5, § 1.

61. 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974). For an extensive discussion of the case, see *Arbitral Adjudication: A Comparative Assessment*, *supra* note 3, at 68-74.

62. 473 U.S. 614 (1985). For commentary on the case, see Campbell & Vollmer, *International Arbitration*, 7 NAT'L L.J., Aug. 19, 1985, at 24; *Assessing the Folly*, *supra* note 17; Comment, *International Arbitration—Commerce—Arbitrability of Antitrust Claims Arising from International Commercial Disputes Recognized Under Federal Arbitration Act: Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 17 SETON HALL L. REV. 448 (1987); Comment, *International Arbitration—The Arbitrability of Antitrust Claims Arising Out of International Commercial Agreements—Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.: The Aftermath*, 8 N.Y. L. SCH. J. INT'L & COMP. L. 349 (1987); Lee, *Antitrust & Commercial Arbitration: An Economic Analysis*, 62 ST. JOHN'S L. REV. 1 (1987); Lipner, *International Antitrust Laws: To Arbitrate or Not to Arbitrate*, 19 GEO. WASH. J. INT'L L. & ECON. 395 (1985); Note, *International Arbitration and the Comity of Error: Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 19 CONN. L. REV. 435 (1987);

curities fraud⁶³ and antitrust violations⁶⁴ could be submitted to arbitration. Grounding its holding in the need to uphold the stability of international trade and commerce,⁶⁵ the Court declared that arbitral jurisdiction could be extended beyond contractual matters to regulatory claims, provided such claims arose pursuant to an international contract.⁶⁶ The dissent in both cases⁶⁷ warned of the dangers of an ill-conceived and facile policy, but these admonishments went unheeded. The girth of the doctrine on international arbitration allowed national public policy to fuse with, and become indistinguishable from, the imperatives of international commerce. According to the rationale of *Scherk* and *Mitsubishi*, the sophistication of arbitral procedures and the wisdom of international arbitrators,⁶⁸ regardless of their legal background or whether they sat in Paris, Tokyo, or Geneva, were sufficient to achieve salutary adjudicatory results in such matters.

Recent Developments, *Arbitration: Arbitrability of Antitrust Claims in International Tribunals*, 27 HARV. INT'L L.J. 227 (1986); Robert, *Une date dans l'extension de l'arbitrage international: L'arrêt Mitsubishi c/ Soler*, 1986 REV. ARB. 173. See also Branson & Wallace, *Choosing the Substantive Law to Apply in International Commercial Arbitration*, 27 VA. J. INT'L L. 39, 50, 54, 57-64 (1986); Symposium, *The Future of Private International Arbitration: Beyond Mitsubishi*, 12 BROOKLYN J. INT'L L. 579 (1986), in particular—Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOKLYN J. INT'L L. 579, 629 (1986).

For related articles that refer to *Mitsubishi*, see, e.g., Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219 (1986); Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777 (1987); Comment, *Arbitrating Civil RICO And Implied Causes of Action Arising Under Section 10(b) of the Securities Exchange Act of 1934*, 36 CATH. U.L. REV. 455 (1987); Fletcher, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393 (1987); Note, *Arbitrability of Claims Arising Under the Securities Exchange Act of 1934*, 1986 DUKE L.J. 548; Note, *Arbitrability of Implied Rights of Action Under Section 10(b) of the Securities Exchange Act*, 61 N.Y.U. L. REV. 506 (1986).

For commentary on the lower court determination of the case (723 F.2d 155 (1st Cir. 1983)), see Comment, *Mitsubishi: The Erosion of the New York Convention and International Arbitration*, 1984 WIS. INT'L L. REV. 151; Recent Developments, *Arbitration: Public Policy Exception to Arbitration of Antitrust Issues*, 25 HARV. INT'L L.J. 427 (1984); Recent Decisions, *Arbitration: Transnational Antitrust Claims Are Nonarbitrable Under the Federal Arbitration Act and Article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 17 VAND. J. TRANS. L. 741 (1984).

63. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974).

64. See *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

65. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-17 (1974).

66. See *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

67. See *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 529 (1974) (Douglas, J., dissenting); *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (Stevens, J., dissenting).

68. See *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630-31 (1985).

ARBITRATION AND U.S. SUPREME COURT

Exempting international arbitration from the reach of the inarbitrability defense, however, was only part of the Court's attack upon the vestiges of legal constraints upon arbitration. Intelligent accommodation of competing considerations was not the order of the day. The Court apparently felt impelled to expiate the sins of a wayward past.⁶⁹ Armed with its resolute view of policy, the Court embarked upon the final stage of its plan to rescue arbitration from judicial hostility.

B. McMahon: *The Epigee of the Liberal Doctrine*

The Court accomplished its ultimate design in *Shearson/American Express, Inc. v. McMahon*⁷⁰—a purely domestic case in which a disaffected investor alleged that his broker violated both the RICO statute and the 1934 Securities Exchange Act in its dealings with him. Their

69. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232-33 (1987). For commentary on the case, see Bedell, Harrison, & Harvey, *The McMahon Mandate: Compulsory Arbitration of Securities and RICO Claims*, 30 CORP. PRAC. COMM. 201 (1988); Cain, *Commercial Disputes and Compulsory Arbitration*, 44 BUS. LAW. 65 (1988); Casenote, *Enforceability of Predispute Arbitration Agreements Under the Federal Securities Laws*, 8 PACE L. REV. 193 (1988); Casenote, *The Acceptance of Arbitration to Settle Disputes Arising Under Section 10(b) of the Securities Exchange Act of 1934 and the RICO Act*, 17 STETSON L. REV. 421 (1988); Casenote, *Shearson/American Express v. McMahon*, 107 S. Ct. 2332, 1987: *The Diminishing Role of Courts in Securities Disputes*, 1988 B.Y.U. L. REV. 443; Casenote, *The Expanding Scope of Securities Arbitration*, 12 NOVA L. REV. 1375 (1988); Di Fiore, *Problems in Alternative Dispute Resolution: Arbitration Agreements as Contracts of Adhesion in Consumer Securities Disputes*, 93 COM. L.J. 259 (1988); Fletcher, *Learning to Live with the Federal Arbitration Act—Securities Litigation in a Post-McMahon World*, 37 EMORY L.J. 99 (1988); Franklin, *Rewriting the Rules: Securities Arbitration; Claims Up; Procedures Proposed*, 119 N.Y. L.J. 5, col. 2 (Jan. 28, 1988); Ginger, *Managing Securities Disputes After McMahon: A Call for Consolidation and Arbitration*, 33 VILLANOVA L. REV. 515 (1988); Hood, *Arbitration and Litigation of Public Customers' Claims Against Broker-Dealers After McMahon*, 19 ST. MARY'S L. J. 541 (1988); Leacock, *Extending Arbitration of Securities Disputes in American Law*, 1988 J. BUS. L. 271; Peloso, *The McMahon Decision: One Year Later*, 199 N.Y.L.J. 3, col. 1 (June 2, 1988); see also Note, *Securities Arbitration - The Supreme Court Resolves the Issue of Enforceability of Mandatory Arbitration Clauses in Broker-Investor Contracts*, 73 IOWA L. REV. 449 (1988); Note, *Predispute Arbitration Agreements Enforceable Against Investors Filing Claims Under Section 10(b) of the Securities Exchange Act of 1934*, 19 ST. MARY'S L. J. 753 (1988); Note, *Who's Protecting Investors? Shearson/American Express v. McMahon*, 107 S.Ct. 2332 (1987), *Compels Private Claims Under Section 10(b) of the Securities and Exchange Act into Arbitration*, 19 ARIZ. ST. L. J. 793 (1987); Note, *Arbitrability of Securities Law and RICO Claims*, 101 HARV. L. REV. 280 (1987); Note, *The Arbitrability of Federal Securities Claims: Wilko's Swan Song*, 42 U. MIAMI L. REV. 203 (1987); Note, *Shearson/American Express v. McMahon: What's Left for the Courts in Securities Litigation?*, 62 TUL. L. REV. 284 (1987); Note, *Agreements to Arbitrate are Valid*, 10 U. ARK. LITTLE ROCK L. J. 523 (1987-88); Comment, *Predispute Arbitration Clauses in a Brokerage Firm's Customer Account Agreement*, 14 WM. MITCHELL L. REV. 907 (1988).

70. See *supra* note 69 and accompanying text.

contract contained a standard clause compelling the parties to arbitrate future disputes. In the golden age of American arbitration law, *McMahon* represents simultaneously arbitration's institutional apogee and its epigee. It was the circumstantial springboard that allowed the Court to expand its arbitral doctrine to limitless and nonsensical proportions. The policy imperatives which previously had segregated domestic from international rulings, a feature which the American law of arbitration shared with its counterparts in other countries, were completely expunged from the *ratio decidendi*.⁷¹ Holdings sculpted to the speciality of transnational litigation suddenly also governed in the domestic setting. Statutorily-conferred rights were subject to arbitration in both national and international cases, provided the legislation in question contained no express prohibition against the referral to arbitration *and*, even if it did, the ruling court retained the discretion to decide whether arbitration was unsuitable in the circumstances to act as a mechanism for resolving the statutory claims.⁷² As a result, McMahon's allegation that his broker committed fraud under the 1934 Securities Exchange Act, and his civil RICO claims, could be submitted to arbitration even though a substantial disparity of bargaining position separated the parties originally and the applicable arbitral framework was subject to significant industry control.⁷³

The *McMahon* Court's disregard of basic consumer interests surely offended even the most hardened sensibilities. Moreover, it indicated that the Court was clearly averse to any restrictions upon the contractual recourse to arbitration or upon the exercise of arbitral jurisdiction. The almost fantastic character of the judicial endorsement of arbitration had finally gone beyond the pale of reason.

The Court's decision amounts to an abdication of its judicial responsibilities both to arbitration and to the litigation crisis. Judicial authority is particularly well-suited to weaving general legislative commands into the intricate and varying dimensions of adjudicatory reality.⁷⁴ The light of the FAA's policy beacon is less limpid where it competes with other vital legal concerns in the specific circumstances of actual controversies. The Court's judicial obligation is to strike a viable compromise that maintains the FAA's essential objectives without extinguishing other central concerns. Rather than craft a doctrine that reconciles the need

71. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232, 238-42 (1987).

72. *Id.* at 232, 242, 249.

73. See *id.*

74. See B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921, 1960); B. CARDOZO, *GROWTH OF THE LAW* (1924, 1960).

ARBITRATION AND U.S. SUPREME COURT

for judicial support of arbitration with the dictates of essential legality, the Court has chosen to engage in its own brand of legislative promulgation. It simply proclaims the righteousness of its self-defined policy and incants it as a solution to all jural difficulties raised in the caselaw.

C. *The Likely Consequences and Possible Motives*

In the current state of the law, the only real limitation upon the recourse to arbitration is the question of whether a valid agreement to arbitrate exists.⁷⁵ In light of the holding in *McMahon* and the boilerplate provision in the contract there at issue, the question could be rephrased more accurately as whether some sort of agreement to arbitrate physically exists at all. The logic of *McMahon* could lead the Court subsequently, in an alleged attempt to safeguard arbitration further and insulate it from yet other possible challenges, to infer the existence of a valid agreement in circumstances in which the Court believes the parties should have agreed to arbitration.⁷⁶ Although such a ruling would be in keeping with the logic and the policy objective underlying the current doctrine, it is unlikely from a practical standpoint—it would be patently absurd and, at least one hopes, would generate public outrage.

The virtual elimination of the inarbitrability defense and the recasting of the role of arbitration in civil dispute resolution, however, are not so far removed or distinguishable from that unthinkable determination. In its search for efficiency in litigation, the Court appears to have advocated an outright substitution of the arbitral process for judicial proceedings in all but constitutional cases. In doing so, it ignores the specific adjudicatory attributes of arbitration and its primary suitability for specialized disputes. The reason for having multiple remedies available in conflictual circumstances, and for giving disputing parties some measure of responsibility in determining their own adjudicatory fate are lessons that appear to have been lost upon the Court. Alternative mechanisms should allow parties to self-empower and to have recourse to a dispute resolution framework that fosters cooperation, mutuality, and self-defined compromise. The Court's objective appears to be to push the parties to arbitration no matter what the dispute, circumstance, need, or financial or substantive law cost.

It may be that the Court's unqualified pronouncements on arbitration reflect its internal decisional dynamics and political alignments. Within a

75. See FAA, *supra* note 5, §§ 2 & 4.

76. I am indebted for this point to Mr. David Nyssen, University of California at Davis School of Law, Class of 1990, who was a student in my ADR course, Fall 1988.

nine-member tribunal, generality and broad conceptualizations as to arbitration may be necessary to maintain a cohesive majority on the politically and socially divisive question of institutional procedural reform.⁷⁷ Such an approach, however, may prove to be very costly. Although the advancement of arbitration as a remedy to the volume of litigation may have some practical administrative benefits, extending the reach of arbitration implicates core values and impinges upon critical rights determinations. The Court's decision implies that the fundamental guarantees of procedural and substantive due process are neither managerially nor economically affordable in the civil setting.⁷⁸ This amounts to a radical and *sub silencio* redefinition of the individual's standing within the political community. Through its doctrine on arbitration, the Court appears to be saying that institutional adjudicatory efficiency is of primary moment and dictates that civil litigants essentially fend for themselves in a system that affords much less protection and is little exposed to public scrutiny. "We have become too civilized in our jural regard for the individual," the Court seems to be reasoning. "We must learn to live with a brand of civil justice that, practically speaking, we can afford as a society."

If this interpretation is correct, the Court is basically proclaiming the insolvency of civil justice in the United States and mandating its disappearance. In this context, the Fiss thesis against ADR,⁷⁹ although arguing primarily for sustaining the normative function of the courts in public law controversies and criticizing informal justice for the support it brings to anti-statism, gains greater credibility in the private civil setting. The restriction of available justice to affordable justice serves the tenets of a conservative political ideology. By giving primacy to the goal of social efficiency in civil litigation at the cost of compromising individual protection, the Court divests the individual of power and attributes overwhelming authority to the institutions that possess economic control or allows their control to go unchallenged. Without an impartial system of public judicial administration, large enterprises will be free to determine how social resources are to be used and distributed; protests from now weakened individuals, unsupported by neutral legal proceedings, will be much less of a thorn in the side of free-wheeling capitalism. Chrysler will be able, for example, to compete more effectively on the international market if it can dispense with products liability, tort, and unfair competition claims through arbitration. Far from latching on to arbitration to remedy the litigation crisis, the Court will have taken the opportunity of

77. I am indebted to Professor Hans Baade for this point.

78. I am indebted to Professor Gordon Christenson for this point.

79. See Fiss, *Against Settlement*, *supra* note 20.

ARBITRATION AND U.S. SUPREME COURT

judicial management problems and used a distorted view of arbitration to disenfranchise individuals from adjudicatory recourse and to lay the foundation for a right-wing form of political organization. Ostensibly released from the bondage of adversarial warfare, individuals are made to live—through judicial deceit—in a dark, anonymous, and “soul-less” society where economic viability and social efficiency alone express the common good. The law abandons protecting the individual worth of the many, and only the privileged few are free to enjoy individuality as a valued political right in civil society.

It is difficult to believe that such an insidious design could have escaped the attention of the Court’s liberal or moderate members or could have gained a nearly unanimous footing in the Court’s decision without vociferous opposition. It is difficult to accept this callous vision as representative of the Court’s actual intendment. These reservations, however, give rise to additional, albeit more drastic but perhaps more plausible, conjecture. The Court’s use of arbitration as an instrument of procedural reform in the legal system may reflect the Court’s reading, or the independent operation, of larger historical forces and social transformations. Population growth, urban concentration, increasingly sophisticated means of transportation and communication, general technological advances compel national societies to greater efficiency and the expenditure of limited resources on other than legal concerns that implement political ideals. The recasting of arbitration, then, is not a mere propounding of ideological tenets, but a step in the direction of relinquishing control and acquiescing to an inevitable historical fate. Not only does the Court’s decisional law promoting the use of arbitration in international transactions acknowledge that domestic economies have been internationalized, but also, in its domestic and international components, the Court’s doctrine appears to proclaim the need to abandon national “myths” about the role of law and adjudication. Because adversarial litigation is inefficient, traditional civil protections must be abandoned in order to guarantee the competitiveness of American society in the emerging, economically boundary-less world community.

None of the implicated parties—the American citizenry, the institution of arbitration, nor ADR—should be manipulated or exploited to achieve political ends or sacrificed to attain greater efficiency in judicial administration. Society should and must remain a human as well as an organizational structure. A much different image of the individual needs to emerge from the debate about the feasibility and role of civil justice in American society. As Rousseau suggested,⁸⁰ the political and juristic

80. See J. J. ROUSSEAU, *OEUVRES COMPLETES* (ed. Intégrale) (M. Launay ed. 1971).

community should be a haven for the individual's development, not a framework for the abuse and repression of people. Rather than attempt to deceive citizens into the shadows of an adjudicatory tyranny or a rudimentary system of dispute resolution, the tenets of ADR demand that adjudicatory procedures activate the talents and resources of people and lead them to a self-defined fulfillment of their needs. The answer to problems in civilization is not the reversion to barbaric mores, but allowing civilization to progress and bear its intended fruits—to teach people to cultivate, act upon, and affirm their human dignity. This is the type of adjudicatory revolt the Court should endorse and spearhead: a tide of change in how society thinks about civil conflict and its impact upon the human personality.

The problem with the present civil justice system is that it obliges litigants to seek the definition of justice in the minds and hearts of others. The adversarial ethic reduces litigants to helplessness in the face of turmoil and deprives them of any participation in the determination of justice. Society—a truly civilized society—should provide its members with an understanding of conflict, remedies, priorities, and values, and should allow individuals to act upon that understanding within the guiding confines of a supportive remedial framework. What circumstances constitute an injury? When are interests truly in conflict? Is the methodology of resolution suited to the particular dispute situation? When should we be willing to fight, compromise, or walk away? How should human trust, dignity, and worth factor into the process?

Arbitration is a vital, albeit small, part of the total response to these inquiries. We need to learn from the experience it proffers and not exploit it as a tool of political repression or transform it into a distant and frail approximation of justice.

IV. REACTIONS TO *McMAHON*

The Court's holding and reasoning in *McMahon* generated a number of significant reactions. Within the arbitration community, widespread securities arbitration appeared to represent an untoward use of the arbitral remedy and to create a need to adapt existing practices to the Court's clear departure from traditional concepts. In the wake of *McMahon*, the American Arbitration Association (AAA) quickly developed a set of institutional rules specifically for securities arbitration.⁸¹ Previously, such cases had been governed by the rules for commercial arbitra-

81. AMERICAN ARBITRATION ASSOCIATION, SECURITIES ARBITRATION RULES (effective Sept. 1, 1987).

ARBITRATION AND U.S. SUPREME COURT

tion.⁸² The alacrity of the AAA reaction indicated that the *McMahon* opinion was a source of new business for arbitral institutions and that arbitration in securities matters presented problems not normally associated with conventional arbitrations.⁸³ With an increased volume of cases, new rules were needed to lessen the industry bias in prior procedures and to account for the parties' disparity of position and for the likelihood that most claims would raise questions of regulatory law.

When compared to their commercial counterparts, the AAA rules for securities arbitration differ in only a few, albeit fundamental, respects. First, in regard to the number of arbitrators on the tribunal, the commercial rules provide that generally only one arbitrator shall be appointed unless the parties provide otherwise or the AAA deems a plurality of arbitrators necessary.⁸⁴ The securities arbitration rules require a panel of three arbitrators whenever a claim exceeds the relatively modest sum of \$20,000.⁸⁵ Second, the appointment of arbitrators is slightly more complicated under the rules for securities arbitration. The parties are given two lists of arbitrators—one listing arbitrators affiliated with the securities industry and the other non-affiliated arbitrators. When the tribunal consists of three arbitrators, at least two must be non-affiliated. If the arbitration is to be done by a sole arbitrator, that arbitrator must be non-affiliated.⁸⁶ Finally, in regard to the award, the rules for securities arbitration require arbitrators to "include a statement regarding the disposition of any statutory claims,"⁸⁷ whereas the rules for commercial arbitration mandate only that the award be in writing and signed by a majority of the arbitrators.⁸⁸

While the rules for securities arbitration are molded to the special character of these disputes, they may not alleviate the basic danger of having recourse to arbitration in a consumer and regulatory context. The practice of having three-member tribunals and a majority of non-affiliated arbitrators may not protect consumer interests sufficiently. It may only provide a formalistic safeguard. Industry practice may still set applicable standards and the public interest may never be defined, elaborated, or referred to in this private adjudicatory process. Unlike judges,

82. Telephone interview with David A. Tick, Senior Tribunal Administrator, AAA Office, San Francisco (Dec. 5, 1988).

83. Telephone interview with Richard E. Lerner, Associate General Counsel, AAA Office, New York (Dec. 5, 1988).

84. See AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES, Rule 17 (effective Sept. 1, 1988).

85. See SECURITIES ARBITRATION RULES, *supra* note 81, Rule 17.

86. See *id.*, Rule 13.

87. *Id.*, Rule 42.

88. See COMMERCIAL ARBITRATION RULES, *supra* note 84, Rule 42.

arbitrators may not have the sense of independence necessary to adopt minority, economically questionable, or otherwise "deviant" positions. Finally, mandating that securities arbitrators expressly acknowledge investor claims of statutory violations only provides superficial recognition of the public law character of the disputes. The rules do not mandate a reasoned assessment of the claim, and appeal to a court is no more readily available in these arbitral circumstances than in others.⁸⁹

Although these alterations do not attenuate the juridical dilemma created by the Court's decision, they do mitigate the harshness of the *McMahon* result. In *McMahon*, the Court was willing to have investor claims resolved through industry-controlled arbitration procedures.⁹⁰ By attempting to deal with disparities in position and the public law aspect of the cases, the new AAA rules at least are pointed in the direction of fairness and seek to protect the institution of arbitration from charges of glaring unsuitability and abuse. It bears reiterating, however, that these rules do not resolve the core problems raised by the arbitrability of securities claims: namely, the adhesionary character of the arbitral compact, the economic and positional inequality of the parties, and the depreciation of the public interest in preventing individual investor fraud and broker overreaching in a sophisticated, volatile market.

Moreover, in its opinion, the *McMahon* Court looked to SEC supervision as a means of justifying its confidence in industry-controlled securities arbitration procedures.⁹¹ If unfairness and injustice surfaced, the Court seemed to reason, the Commission would be there to provide the necessary correction. "Black Monday"⁹² demonstrated the fallacy of the Court's reasoning and made the underlying problems with securities arbitration transparent. Following the stock market collapse, an avalanche of investor claims were submitted to the industry-controlled arbitral framework.⁹³ Apparently, the SEC was unable to exercise its anticipated supervisory capabilities. The volume of pending cases and a growing public dissatisfaction with arbitral procedures led the Commission to consider asking for congressional legislation prohibiting mandatory pre-dispute arbitration agreements in investor-broker contracts.⁹⁴ It eventu-

89. See FAA, *supra* note 5, § 10.

90. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 234 (1987).

91. See *id.*

92. The Dow Jones industrial average dropped 508 points on the New York Stock Exchange on Monday, October 19, 1987.

93. See, e.g., *Arbitration Backlog Keeps Investors Waiting for Relief*, The Christian Science Monitor, Oct. 21, 1988, § Business, at 13.

94. See *id.*

ARBITRATION AND U.S. SUPREME COURT

ally resolved, however, merely to request a study of the problem.⁹⁵ The depth of regulatory oversight from the Commission envisaged by the *McMahon* Court simply does not exist.⁹⁶

SEC inaction and public outcries of injustice with mandatory arbitration in securities cases may lead to legislative attacks upon the arbitral process.⁹⁷ The *McMahon* opinion, in fact, gave rise to a determination in some legislative quarters to oppose the Court's reordering of fundamental juridical priorities. A few months after the *McMahon* decision, the Massachusetts state legislature enacted provisions prohibiting the use of mandatory arbitration clauses in investor-broker contracts.⁹⁸ Under the legislation, which took effect in January 1989, brokers must inform prospective clients of their legal right to judicial redress of their grievances. Moreover, brokers must still do business with investors who refuse to agree to arbitrate.⁹⁹ While the legislation is directed to consumer protection, it casts arbitration in an unfavorable light, stigmatizing it as an adjudicatory mechanism that can be manipulated by special interests and can become an instrument of abuse. A discredited and misunderstood process, then, may be the ultimate legacy of the Court's liberal stance favoring arbitration.

Because the Massachusetts law conflicts directly with the federal law on arbitration and the content of the Court's arbitral doctrine, it has been attacked on constitutional grounds.¹⁰⁰ While the statute did not survive legal challenge, it provides the impetus for triggering a congressional response to the *McMahon* doctrine. The history of American arbitration law would then have come full circle. In the early days of

95. See *id.* In 1988, the SEC opposed proposed congressional legislation that would have made pre-dispute arbitration agreements voluntary in brokerage agreements. See Cain, *Commercial Disputes and Compulsory Arbitration*, 44 BUS. LAW. 65, 84 n.163 (1988). Accord, Feldman, *Enforcement of Foreign Arbitral Awards in the U.S. Courts*, 3 MEALEY'S INT'L ARB. REP. 15 (Nov. 1988) (New York Stock Exchange proposed a rule change to the SEC to make predispute arbitration clauses more visible in brokerage contracts and to improve the customer arbitration process).

96. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 234 (1987).

97. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (Blackmun, J., dissenting).

98. See, e.g., *Massachusetts Says Brokers Can't Insist on Arbitration*, Wall Street J., Sept. 22, 1988, at 39, cols. 5 & 6.

99. See *id.*

100. See *id.* The Massachusetts law was struck down at the federal district court level on the ground that it conflicted with the Supreme Court's "forceful endorsement of the arbitration process." See *Securities Industry Assoc. v. Michael J. Connolly, Secretary of State*, 703 F. Supp. 146 (D. Mass. 1988), *aff'd*, 883 F.2d 1114 (1st Cir. 1989), *pending*, 58 U.S.L.W. 3467 (U.S. Jan. 22, 1990) (No. 89-894). See also Wall Street J., Dec. 20, 1988, at B8, cols. 3 & 4. This decision was upheld on appeal. See 58 U.S.L.W. 2155 (1st Cir. Sept. 19, 1989). Accord *Saturn Distribution Corp. v. Williams*, 58 U.S.L.W. 2158 (D.C. Va. Sept. 19, 1989).

rehabilitation, New York legislation provided the basis for positive federal action; now, the Massachusetts provisions eventually could set the stage for restrictive congressional amendments.¹⁰¹ Such action must be balanced to avoid tainting the arbitral process with an illegitimate institutional stature. An intelligent sense of the institution and a moderate consideration of its needs and role by the courts could have avoided such a correction.

A. Volt: A Note of Dissonance

A recent decision by the Supreme Court, *Volt Information Sciences v. Stanford University*,¹⁰² renders the corpus of cases on arbitration resistant to coherent interpretation. The ruling sounds a note of dissonance, but the Court's failure to propound the arbitration policy of old does not make the judicial doctrine on arbitration any more limpid or any less applicable. At a facial level, the opinion indicates that the Court wants to anchor the American law of arbitration completely in the precept of contractual freedom,¹⁰³ making party choice its inaugurating and culminating principle (acting both as a principle legitimating arbitration and as a source of restraint upon the process). Deeper scrutiny, however, reveals that the Court's construction of contractual intent is so strained¹⁰⁴ and its general reasoning is so dependent upon distortive dis-

101. See *Arbitral Adjudication: A Comparative Assessment*, *supra* note 3, at 36-39. Whether the Congress is prepared to revise the content of the FAA is a matter of conjecture. Recent legislation indicates that the Congress strongly supports the recourse to arbitration. H.R. 4807 provides for the immediate appeal of court decisions denying recourse to arbitration prior to litigation. Other legislation modifies the Foreign Sovereign Immunities Act of 1976 and admiralty laws to facilitate arbitration. See *President Signs Arbitration Bills*, 3 INT'L ARB. REP. 13 (Nov. 1988); Feldman, *Arbitration Law Strengthened by Congress*, 200 N.Y. L.J. at 1, col. 1 (Nov. 10, 1988). A legislative reversal of the Court's doctrine may then be difficult to muster, although the outrageous direction of the recent decisions begs for correction. Moreover, although the Court may be the principal instrument of current arbitration policy, its aggressive pursuit of that policy has never been subject to any form of congressional moderation. Such legislative acquiescence may well continue to characterize the congressional posture on this issue.

British legislation may indicate how to achieve an accommodation of the competing interests in this matter. The British Consumer Arbitration Act of 1988 recognizes the submission as the only valid arbitration agreement in consumer transactions. Having the parties agree to arbitration only once a dispute arises minimizes their disparity of position. See *New Arbitral Legislation on the Books in Britain*, 3 INT'L ARB. REP. 8 (Sept. 1988).

102. *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 109 S. Ct. 1248 (1989).

103. *Id.* at 1253-55 ("It [the FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." "Arbitration under the Act in [sic] a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Id.* at 1255).

104. *Id.* at 1253, 1257 n.4, 1259 n.7.

ARBITRATION AND U.S. SUPREME COURT

tinctions¹⁰⁵ that the true gravamen and underlying doctrinal significance of the opinion are difficult to unmask.

Volt involved a standard contractual arrangement between Stanford University and Volt, one of several contractors working on a large construction project on the Stanford campus.¹⁰⁶ Its contract, to install a system of electrical conduits, contained standard provisions on dispute resolution and choice of law, respectively providing for arbitration and the application of local law. A dispute arose between Volt and Stanford regarding compensation for extra work allegedly performed by the contractor. Volt demanded arbitration, and Stanford initiated a legal action in which it sued Volt for breach of contract and fraud and also sought indemnification from two other contractors not bound by an arbitration agreement. The California courts denied Volt's motion to compel arbitration and ordered a stay.¹⁰⁷ According to California procedural law,¹⁰⁸ a court has discretionary authority to stay arbitral proceedings pending the resolution of related litigation against third parties not bound by the arbitration agreement. The purpose of the provision is to avoid conflicting rulings on the same matter by different tribunals.¹⁰⁹

As exhibited by the contract provisions, the parties' intent was to enter into an ordinary commercial transaction and to have subsequent disputes pertaining to performance or execution resolved through arbitration. In the event of a dispute, the arbitrators would interpret the contract, assess the parties' conduct, and rule upon the controversy by reference to the governing law of the contract. Neither the principal contract nor the arbitration agreement made any reference to the procedural law that would govern the arbitral proceeding except for the designation of special AAA rules for the arbitration of construction disputes as the applicable institutional rules.¹¹⁰ The arbitration agreement did provide, however, that the "agreement to arbitrate . . . shall be specifically enforceable under the prevailing arbitration law."¹¹¹ The validity of the arbitration agreement (hence its enforceability) was then to be governed (at least arguably) by California law. Such contract stipulations, how-

105. *See id.*

106. *Id.* at 1251.

107. *See id.* at 1250 (citing *Board of Trustees v. Volt Information Sciences, Inc.*, 195 Cal. App. 3d 349, 240 Cal. Rptr. 558 (1987)).

108. *See* CAL. CIV. PROC. CODE ANN. § 1281.2(c) (West 1982).

109. The provision, however, is worded in conditional language—the court *may* refuse, order, or stay. In fact, the court has wide-ranging discretion: it may stay either the judicial or arbitral proceeding and may order joinder of parties on some or all of the issues. Under the language of § 1281.2(c), therefore, the California court could easily have reached a determination more favorable to arbitration.

110. *Volt Information Sciences, Inc. v. Board of Trustees*, 109 S. Ct. 1248, 1251 n.1.

111. *See id.*

ever, are basically meaningless in domestic American law. The Court's trilogy cases¹¹² established that, when state law provisions on arbitration govern arbitral proceedings, they must be applied in conformity with the basic dictates of the FAA. The phrase "prevailing arbitration law" in the Volt arbitration agreement referred either directly to state law as it conforms to federal law or indirectly to the FAA itself.

The question before the United States Supreme Court was two-fold: had the parties in *Volk* intended to have California law govern not only the contract, but also any ensuing arbitration and, if so, was the applicable law valid under the Supremacy Clause of the Federal Constitution given that the application of state law resulted in staying arbitration? In turn, these issues engendered a more wide-ranging, albeit circuitous, question: Could party intent be used to defeat the agreed-upon recourse to arbitration? In other words, although the parties agreed to resolve their contractual disputes through arbitration, they would have expressly provided for the application of a state law that could, upon the exercise of judicial discretion, undermine that intent. California state courts held that the choice of law clause (mandating the application of local law) also governed the arbitration agreement.¹¹³ Because California law applied and its procedural law allowed courts to stay arbitral proceedings in circumstances of "intertwining" arbitral and legal proceedings, Volt's request to compel arbitration could lawfully be denied.¹¹⁴ This determination permitted state law to frustrate the rationale of and predominate over the FAA. In practical terms, it simply provided Stanford, the non-complying party, with a loophole to avoid arbitration.

In prior rulings, the Court held unequivocally that state and federal regulatory legislation could not block the recourse to arbitration.¹¹⁵ Franchise disputes under state law and disputes involving the RICO statute, securities rights, and antitrust matters were arbitrable.¹¹⁶ The rule of unfettered recourse applied even when the consent to arbitrate was suspect and the likely product of duress.¹¹⁷ The aim of promoting adjudicatory efficiency in these cases was not a sufficiently significant concern to override the FAA's policy mandate.¹¹⁸

With an impressive 6 to 2 majority, the Court nonetheless held in *Volt* that the parties' contractual intent was clear (or, at least, the state

112. See *supra* text accompanying notes 38-48.

113. Board of Trustees of the Leland Stanford Junior Univ. v. Volt Information Sciences, Inc., 195 Cal. App. 3d 349, 353, 240 Cal. Rptr. 558, 559-60 (1987).

114. *Id.* at 355, 240 Cal. Rptr. at 559-60.

115. See *supra* text accompanying notes 38-48.

116. See *supra* text accompanying notes 38-73.

117. See *supra* text accompanying notes 70-73.

118. See *supra* text accompanying notes 42-48.

court's interpretation of it could not be challenged)¹¹⁹ and that the intent to have state law govern could effectively defeat the agreement to arbitrate.¹²⁰ The Court's previous preoccupation with elaborating legal rules uniformly favorable to arbitration was nowhere to be found. Now, the Court was of the view that the FAA meant to have arbitration agreements enforced as written.¹²¹ According to the Court, parties who expressly agree to arbitrate disputes also can agree—by implication from a choice of law provision—to undo that agreement whenever a court decides to exercise its discretion to stay arbitral proceedings under state procedural law. It is curious that the Court engaged in such transparently circuitous reasoning and did not perceive the evident challenge posed to the supremacy of the federal law on arbitration.

Volt raises a host of perplexing questions. Is it nothing more than a conflict-of-laws case pure and simple? The Court gives the parties exactly what they expressly, albeit inadvertently, bargained for—refusing to offer any redemption from their inadvertence and pointing them in the direction of professional malpractice laws as a means by which to deal with the deficiencies that proceeded from insertion of ill-suited boilerplate provisions in the contract. Is *Volt* also a case significant to the developing law on arbitration? Does the opinion, for example, modify the previously inviolable status of the “emphatic federal policy” on arbitration? Does it indicate a shifting away from federalization and a resurgence of concern for states’ rights? Is the Court saying that the federal policy on arbitration will be triggered only when an unequivocally valid agreement to arbitrate exists? How does such a ruling square with *McMahon*¹²² where, despite the satisfaction of contractual formalities, true intent to arbitrate was clearly lacking? Does *Volt* portend the elaboration of legal restraints on arbitration or is it the product of the Court’s conservative ideology favoring the strict construction of contracts and the enforcement of legal obligations as made?

The content of prior rulings would have predicted an espousal by the majority of the basic approach and content of the dissenting opinion.¹²³ In arguing for a reversal, the dissenting justices emphasized the state law’s detrimental impact upon and inconsistency with the provisions of the FAA and its objectives.¹²⁴ State law, after all, was being used to thwart agreed-upon recourse to arbitration. Because the dissent repre-

119. *Volt Information Sciences, Inc. v. Board of Trustees*, 109 S. Ct. 1248, 1252.

120. *Id.* at 1255-56.

121. *Id.*

122. See *supra* text accompanying notes 70-73.

123. *Volt Information Sciences, Inc. v. Board of Trustees*, 109 S. Ct. 1248, 1256.

124. *Id.* at 1256-62.

sented the views of the Court's two most liberal members, ideological differences appear to be at the heart of the determination. Rather than a statement on arbitration law, *Volt* seems to reflect the majority's adherence to the sanctity of contract which, in turn, acts as a vehicle for expressing a particular concept of the role of government and the place of the individual in society.

In *Volt*, then, the development of American arbitration law is not of uppermost significance. The legal questions raised by the case appear to serve as a basis for ideological positioning among the Justices. In fact, this factor may have influenced the development of arbitration law all along. At times, and for a variety of reasons, the disparate ideological strains within the Court coalesced into a unitary majority (as on the question of the arbitrability of statutory rights or the role of arbitration in international commerce); in these instances, opposition came from divisions within a particular ideological camp rather than between the different camps (for example, Justice Douglas' dissent in *Scherk* and Justice Stevens' dissent in *Mitsubishi* and their pleas for statutory rights); and, finally, as seems to be the case in *Volt*, issues of arbitration law distill the Court's ideological composition into its purest polarity. The liberal minority is pitted against both moderates and conservatives whose belief in laissez-faire policies clashes with the conviction that the state must assume central responsibility and both confer and protect federal rights.

Whatever else may be implied by this analysis, there is no doubt that the Court's decisions place the integrity of American arbitration law in jeopardy by making arbitration subservient to purely political concerns. It is unfortunate that juridical principles do not have a sufficient presence to command a more impartial consideration. The law of arbitration does not, on its own, present a set of highly charged political questions. Although upholding the legislative command that underlies the FAA may involve changes in society that have political implications, the legal rules that govern arbitration should not be abstracted or distanced too greatly from their core context and reformulated or redefined to accommodate political tenets. It would be naive to suggest that the Court is not a potent political organ or an instrument of potentially profound social change. The Court, however, should refrain from politicizing every legal issue that comes within its purview. Arbitration law should not be elevated to the stature of civil rights, nor should it be emptied of its defining content to promote sectarian visions of the political good.

Asking the Court to rule in a more principled fashion may be unrealistic and ultimately a task humanly impossible to fulfill. We are all prisoners of our convictions, beliefs, and experiences. There is, however, a difference between tainting legal determinations with ideological

ARBITRATION AND U.S. SUPREME COURT

convictions and subordinating all social and individual concerns addressed to the law to an overarching set of political beliefs. There is substantial danger in straying from the independent core and intrinsic reality of issues. This approach creates confusion, reduces the effectiveness of law and legal processes, and diminishes the integrity and social mission of the institution that is being distorted. Under the leadership of former Chief Justice Burger, the Court at least linked its policy on arbitration to achieving necessary procedural reform; with the Rehnquist Court that illusion apparently has been shattered.

B. Rodriguez: *A Reaffirmation*

The Court's most recent pronouncement on arbitration, *Rodriguez de Quijas v. Shearson/American Express, Inc.*,¹²⁵ reinforces the doctrinaire character of the evolving judicial policy on arbitration, resolving any doubt created by *Volt* about the direction of American arbitration law. *Rodriguez* is the last nail in the coffin of the inarbitrability defense. In now predictable fashion, the Court decided that claims arising under the 1933 Securities Act were arbitrable and overruled *Wilko* because it embodied a would-be "outmoded presumption of disfavoring arbitration proceedings."¹²⁶

Like *McMahon*, the facts of *Rodriguez* involved allegations of consumer fraud in an investor-broker securities purchase contract. The plaintiffs, who had signed a standard contract containing an arbitration clause, claimed violations of both the 1933 Securities Act and the 1934 Securities and Exchange Act. Under *McMahon*, the 1934 Act claims had to be submitted to arbitration; the issue of litigation was whether the 1933 Act claims should follow a similar course, especially in light of the *Wilko* precedent barring non-judicial recourse for such claims.¹²⁷

In a 5 to 4 opinion, the Court used many of the principles articulated in *Mitsubishi* and *McMahon* to discredit completely the doctrine established by *Wilko*. The Court through Justice Kennedy made much of the fact that arbitration was "merely a form of trial"¹²⁸ chosen by the parties to resolve their disputes. The content of the rights involved was not affected by the procedure for deciding how these rights were applied. Arbitral proceedings were just as effective as judicial procedures in establishing the rights of the parties. Moreover, statutory rights did not

125. 109 S. Ct. 1917 (1989), *vacating as moot*, 845 F.2d 1296 (5th Cir. 1988).

126. *Id.* at 1920.

127. *Id.* at 1919.

128. *Id.*

occupy a privileged station; they, like any contractual obligation, could be submitted to arbitration for adjudication. Also, having recourse to arbitration resulted only in a waiver of the Act's procedural guarantees, not of the substantive rights it created. The Act's non-waiver provision applied only to the substantive provisions of the legislation.¹²⁹

The majority opinion emphasized that *Wilko* did not correspond to the contemporary pronouncements of the Court on arbitration: "To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."¹³⁰ *Wilko* was imbued with "the old judicial hostility to arbitration"¹³¹ and did not address the arbitrability question "with a healthy regard for the federal policy favoring arbitration"¹³² mandated by the second trilogy.¹³³ The ruling in *McMahon* dictated that *Wilko* could no longer stand as applicable law because the language of the 1933 and 1934 Acts pertaining to judicial remedies was identical: "Indeed, in *McMahon* the Court declined to read § 29(a) of the Securities Exchange Act of 1934, the language of which is in every respect the same as that in § 14 of the 1933 Act, . . ., to prohibit enforcement of predispute agreements to arbitrate."¹³⁴ Furthermore, an inconsistent interpretation of the provisions of the two acts would impair the harmony of the regulatory scheme for the sale of securities and invite the undermining of the statutory framework: "[T]he inconsistency between *Wilko* and *McMahon* undermines the essential rationale for a harmonious construction of the two statutes, which is to discourage litigants from manipulating their allegations merely to cast their claims under one of the securities laws rather than another."¹³⁵

As with the *McMahon* opinion, the Court's reasoning in *Rodriguez* is not only inaccurate and deficient, but also smacks of duplicity. The argument that arbitration is "merely a form of trial" and, therefore, has no impact upon substantive rights is indeed a curious, if not blatantly specious, contention coming from the highest tribunal in a legal system the

129. *Id.* at 1920.

130. *Id.*

131. *Id.* (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

132. *Id.* (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

133. For a discussion of the trilogy, see *supra* note 42 and accompanying text.

134. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1921 (1989).

135. *Id.* at 1922.

cardinal adage of which is that there are no rights without remedies. It is a legal culture in which legal procedure—due process and equal protection concerns—is the primary ingredient of justice. In both theory and practice, arbitration is a reduced form of adjudication to which parties consent because they want to avoid legal intricacies. Judicial and arbitral proceedings are two very different forms of achieving justice, responding to variegated goals. It is simply nonsense to equate them and to disregard the well-settled view that party consent, knowingly and freely given, is at the very core of arbitral adjudication's legitimacy.

Justice Kennedy's assessment of statutory rights and of the securities legislation is riddled with the misconceptions that attended the reasoning in *Mitsubishi* and *McMahon*. Legal rights created by statute, conferred in the wake of a financial disaster and meant to eradicate fraud and overreaching against consumers by investment brokers, are not equivalent—at least, in a domestic setting—to claims for defective performance or lack of performance arising from contracts between equally sophisticated commercial parties. Statutory rights, such as those contained in the securities legislation, the antitrust statutes, and RICO, implicate the public interest because they deal with the general welfare of society by affording individuals special protections and prohibiting conduct deemed reprehensible by the general mores. These statutes define basic precepts of the community order and thereby rise to the level of public policy. As a consequence, they demand implementation and supervision by social institutions invested with public authority and exercising public responsibilities. Why affording this status to statutory rights, a status founded upon self-evident fact, should detract from the autonomy or legitimacy of arbitration is beyond logical comprehension. The threat of using statutory rights claims as a dilatory tactic can be averted by court supervision of the merits of statutory claims upon a motion to stay arbitration. Moreover, if bona fide statutory claims exist, they can be severed from the ordinary contract disputes, allowing the latter to proceed to arbitration. The Court's characterization of statutory rights simply escapes the bounds of common sense.

Justice Kennedy's discussion of the securities legislation is troubling for other reasons. The majority's view that the non-waiver provision of the 1933 Act applies only to the substantive and not the procedural rights contained in the Act is particularly porous and self-serving. Congress intended to buttress the investor's position by affording special remedies that minimized the investor's litigious burden. Qualifying such rights as merely procedural and waivable through adhesions agreements begs the question and is an evident attempt to subvert the substantive guarantees proffered by the statute. Facilitating access to courts and minimizing evidentiary burdens are, in the American legal process

especially, the most effective way to give content to substantive rights. Moreover, the majority's concurrent reading of the non-waiver provisions of the 1933 and 1934 Acts is diametrically opposed to its interpretation of the same provisions in *Scherk*.¹³⁶ In *Rodriguez*, the non-waiver provisions are deemed identical, while, in *Scherk*, they are considered to contain completely different legislative commands—thereby rendering in *Scherk* the 1934 Act claims (unlike 1933 Act claims) submissible to arbitration. Although legal significance may vary, the express language of statutes does not change over time without legislative amendment. The Court makes no reference to *Scherk* and offers no explanation for its drastic change of position.

The Court anchors its reasoning in the need to expunge judicial hostility to arbitration.¹³⁷ The central issue of the American law of arbitration, however, is no longer one of legitimating arbitration, but rather establishing the basic boundaries of the process. As contractual freedom must not impinge upon the public order to remain workable in the legal order, so must arbitration acquire some essential contours and basic limitations. By invoking the danger of judicial hostility, the Court is battling a chimerical risk, an historical ghost that has ceased to influence the reality of the process. In any event, a fair reading of *Wilko* could not possibly lead to a construction of the opinion as a decision hostile to arbitration.

Several of the Court's opinions in labor arbitration matters differ radically from the *McMahon-Rodriguez* view of the arbitrability of statutory rights. These cases establish a distinction between deferral to arbitration in the area of pure contract rights and interpretation and deferral to arbitration in the adjudication of statutory rights. The Court has refused to allow an arbitrator's award to preclude judicial action for claims based upon statutorily-created rights contained in Title VII of the Civil Rights Act,¹³⁸ the Fair Labor Standards Act,¹³⁹ and Section 1983 of the Civil Rights Act.¹⁴⁰ Here, recourse to arbitration under the provisions of a collective bargaining agreement does not preclude the employee from seeking judicial relief under state or federal law for the same claim. The employee, in effect, gets two bites at the apple. In these decisions, the Court finds arbitration to be an inadequate substitute for the courts in

136. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

137. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1920. 138. 42 U.S.C. § 2000(a) (1976).

139. 29 U.S.C. § 206(a) (1976).

140. 42 U.S.C. § 1983 (1984). See *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. West Branch*, 466 U.S. 284 (1984). *Accord Owens v. Texaco*, 48 FEP Cases 147 (U.S. 5th Cir. 1988).

the protection of statutorily-created rights, and grounds its reasoning expressly in a protection of rights rationale and in the need to preserve the courts' exclusive jurisdiction in such matters.

These decisions not only conflict with the NLRB's current policy of deferral to arbitration,¹⁴¹ but are also in marked contrast to the *Mitsubishi-McMahon-Rodriguez* appraisal of the significance of statutory rights in the commercial arbitration context. Why are the rights provided under the various statutes in the labor law context more significant than those contained in the Sherman Act, RICO, or the Securities Acts? How did the Court arrive at its prioritization of the importance of the rights involved? What elements distinguish the labor and commercial context and make the right to adjudicatory relief less important in the latter? The contrast in approach appears devoid of any rational basis.

The dissent in *Rodriguez* grounds its criticism in a separation of powers argument and the need to have the Court respect legislative authority

141. Because of the National Labor Relations Board's policy of deferring to arbitration, labor arbitrators effectively decide unfair labor practice claims—claims that arise under the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 173 (1976). The Board's policy, which includes deferral to both an arbitral clause and an award, arose from the U.S. Supreme Court's recognition of the importance of arbitration in federal labor policy. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960).

In the *Steelworkers* trilogy, the Court stated that arbitration contributed to the goal of fostering industrial stability and peace. See *Warrior & Gulf Navigation*, 363 U.S. 574, 576 (1960). In *International Harvester Co.*, 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1962), *enf'd sub nom.*, *Ramsey v. N.L.R.B.*, 327 F.2d 784 (7th Cir. 1964), *cert. denied*, 377 U.S. 1003 (1964), the Board stated that it had "considerable discretion to respect an arbitrator's award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act." 51 L.R.R.M. 1155, 1156. The Court fully endorsed this view in *Carey v. Westinghouse Electric Co.*, 375 U.S. 261, 272 (1964).

See also *Collyer Insulated Wire*, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971) (landmark case creating a preclusion doctrine under which Board was precluded from hearing an unfair labor practice charge if parties had binding grievance-arbitration clause in collective bargaining agreement which would resolve both contractual and statutory issues); *United Technologies Corp.*, 268 N.L.R.B. 557, 115 L.R.R.M. 1049 (1984) (reaffirmed deferral policy articulated in *Collyer*); *Olin Corp.*, 268 N.L.R.B. 573, 115 L.R.R.M. 1056 (1984) (articulates present Board policy on post-arbitral deferral which is similar to one articulated in *Collyer*). These decisions effectively force employees to arbitrate statutory rights guaranteed under section 7 of the NLRA in a procedure meant to resolve rights emanating from a private agreement. See generally Jeannette, *NLRB Policies Concerning Deferral to Arbitration*, 38 LAB. L. J. 348 (1987); Morris, *NLRB Deferral to the Arbitration Process: The Arbitrator's Awesome Responsibility*, 7 IND. REL. L. J. 290 (1985); Ray, *Individual Rights and NLRB Deferral to the Arbitration Process: A Proposal*, 28 B.C.L. REV. 1 (1986); Shank, *Deferral to Arbitration: Accommodation of Competing Statutory Policies*, 2 HOFSTRA LAB. L. J. 211 (1985). For the Court's view of the non-preclusive effect of arbitration upon employee rights which are created by state statutes, see *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

in establishing law. According to Justice Stevens, when the Court's "earlier opinion gives a statutory provision concrete meaning, which Congress elects not to amend during the ensuing 3 ½ decades, our duty to respect Congress' work product is strikingly similar to the duty of other federal courts to respect our work product."¹⁴²

The dissent's reference to judicial respect for congressional prerogatives is perspicacious because it now appears that the only means of restoring balance and integrity to the American law of arbitration is through the exercise of legislative authority. *Rodriguez* confirms the Court's determination to eliminate any meaningful role for the inarbitrability defense in the American law of arbitration. While such a position might be defensible in terms of international commercial arbitration, it is inapposite for any domestic regulation of arbitration because it produces an imbalance between private prerogatives and public duties and attributes to arbitration an adjudicatory task that it is ill-prepared and unsuited to perform. "Dumping" unwanted judicial caseloads can only harm the arbitral process in the long run, especially when it requires arbitrators to rule upon socially significant issues that are regulated by statute. In the end, society may not only be riddled with an inefficient judicial process, but it may also have lost a workable alternative mechanism for specialty claims.

Congressional action should be taken to amend the provisions of the FAA to exclude bona fide claims based on statutory rights from the purview of arbitration and to prevent arbitrators from exercising public jurisdictional authority—prohibiting them, for example, from awarding punitive or treble damages. In addition, some thought should be given to adding a public policy exception to the grounds for vacating awards. Such a provision could stand as a symbol of the dividing line between judicial and arbitral jurisdiction.

V. REASSERTING JURIDICAL CONTROL OVER ARBITRATION

In terms of both doctrine and practice, the critical problem of American arbitration law is to find a means of imposing necessary legal restraints upon the arbitral process without robbing it of its autonomy. The American law of arbitration needs to be disabused of the notion that legal restrictions perforce amount to a rebirth of juridical hostility toward the arbitral process. For the sake of arbitration, a firm equipoise must be established between extra-judicial processes and the basic dictates of legality. The Court's single-minded posture is the chief obstacle.

142. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1923.

The decisional law on arbitration lacks the discipline of logic and the light of reason, and has succumbed to the temptation of unprincipled policy. The FAA appears on the verge of being emptied of its promise to legitimate arbitration. Once again, arbitration will have been stymied by the judiciary, this time by the intellectual paralysis of unfounded trust that in the end is more antagonistic than the forthright hostility of days gone by—now, surreptitiously, albeit perhaps unwittingly, rediscovered.

Comparative analysis reveals that the imposition of basic legal constraints through moderate judicial supervision does not undermine arbitral autonomy. In fact, United States arbitration law is as unique and unwieldy as is our legal system's reliance upon the adversarial ethic.¹⁴³ Courts in other jurisdictions engage in minimal supervision without bringing into question the viability of the arbitral process as a dispute resolution mechanism. Arbitral laws in other countries recognize that the contractual recourse to arbitration and its adjudicatory procedures must conform in a meaningful way to ordinary legal constraints. Civil law statutory schemes and decisional law opinions carefully balance considerations of autonomy and juridical imperatives.¹⁴⁴ Moreover, arbitration in these systems is applied primarily, if not exclusively, to commercial matters.¹⁴⁵ It has not been extended to all classes of disputes without regard to the status of the parties or to the legal nature of the controversy. Arbitration nonetheless continues to perform a critical dispute resolution function. When problems with the administration of justice surface, civil law systems introduce changes in litigation procedures rather than redefine the process of arbitration and place unwarranted burdens on it.¹⁴⁶

Despite the Court's reference to the "second look" doctrine in *Mitsubishi*, it is unlikely that any meaningful reformation could take place through a stricter judicial scrutiny of awards. Unlike its counterparts in other legal systems, American arbitration law never really knew a period in which courts reviewed awards on the merits;¹⁴⁷ judicial opposition in the United States appears to have manifested itself primarily in challenges to the validity of arbitration agreements.¹⁴⁸ This practice may

143. See *supra* note 22 and accompanying text.

144. See J. ROBERT & T. CARBONNEAU, *THE FRENCH LAW OF ARBITRATION* (1983).

145. See *id.*

146. See Perrot, *Les Réformes Récents en Matière de Procédure Civile*, 1989 R.I.D.C. 591.

147. See *supra* notes 3 and 5 and accompanying text (sources cited).

148. In an 1814 case, *Tobey v. County of Bristol*, 23 F.Cas. 1313 (C.C. Mass. 1845) (No. 14,065), Mr. Justice Story characterized the American judicial perception of arbitral adjudication:

Courts of equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitration, as against public policy. On the contrary, they have and can have no just objection to

have led to the strong language of section two of the FAA, proclaiming arbitration agreements to be "valid, irrevocable, and enforceable."¹⁴⁹ Judicial review of awards, to be in keeping with the letter and spirit of the FAA, would need to be confined to fundamental concerns. The exercise of court authority should not become an invitation to have judicial second-guessing of arbitral determinations. Exercised with a sense of its appropriate role and place in arbitration law, the contemplated judicial supervision could effectively supplant the syllogistic application of the current rule: namely, that if arbitration is a legitimate form of adjudicatory recourse, and there is an agreement to arbitrate, the award is therefore valid and enforceable.¹⁵⁰

these domestic forums, and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.

23 F.Cas. 1313, 1320-21. See also Note, *Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention*, 23 VA. J. INT'L L. 75, 83, n. 30 (1982).

149. See FAA, *supra* note 5, § 2.

150. Consider, for example, the exercise of equitable power by an arbitrator. Such authority is clearly authorized by the applicable AAA rule. See Commercial Arbitration Rules, Rule 43 ("The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. . . ."). AAA arbitrators, however, are not empowered to rule as *amiable compositeurs*. The latter form of arbitration is known chiefly, if not exclusively, in continental legal systems; it is a power of adjudication that is specifically conferred by the parties' agreement and enables the arbitrators to disregard completely the applicable law when they deem it insufficient or incapable of providing a fair determination in the matter. It is viewed as an exceptional form of arbitral adjudication; ordinarily, continental arbitrators rule according to law. See, e.g., E. LOQUIN, *L'AMIABLE COMPOSITION EN DROIT COMPARÉ ET INTERNATIONAL: CONTRIBUTION A L'ETUDE DU NON-DROIT DANS L'ARBITRAGE COMMERCIAL* (7th ed. 1980). The AAA rules do not contemplate the grant of such unrestricted equitable adjudicatory powers to arbitrators; to the contrary, they require specifically that the arbitral determination—even if fashioned by reference to equity—be within the scope of the parties' agreement.

Against this background, assume that an award clearly reveals that the arbitrators expressly stated that they had unlimited powers in equity to decide the dispute, misquoting or ignoring the applicable AAA rule on commercial arbitration. As a result, the arbitrators failed to acknowledge that their adjudicatory authority was limited by the content of the parties' agreement. Regardless of whether the arbitrators' statement actually led to a misuse of authority in their determination, their blatant assertion of excessive powers requires judicial correction. It not only represents an arrogant or negligent overreaching by the arbitrators, but it also can taint the arbitral process with the appearance of yielding arbitrary and capricious results.

An opposite position, inspired by the policy supporting arbitration unequivocally, would hold that, no matter how flagrant, arbitral adjudicatory errors must have impact on the merits if they are to be sanctioned by courts. Also, such a position would argue for the

ARBITRATION AND U.S. SUPREME COURT

It is unlikely—even from an historical perspective—that placing such a restraint upon arbitration would lead, either immediately or eventually, to the undoing of the institution by reintroducing judicial hostility. Given the evolution of the law, there is little possibility of a relapse to the old attitude, unless abuses continue to be tolerated or courts refuse to exercise a minimal level of supervision. Such a practice may well inspire a renewed confidence in the viability of the process. The potential for unbridled license would appropriately be replaced by a sense of necessary, albeit minimal, standards that could meet basic adjudicatory expectations. The danger with moderate judicial supervision is either that arbitral institutions will attempt to circumvent it or that courts will resort to it in a purely formalistic manner. In any event, it does not square with the tenor of the Court's doctrine.

Amending the legislation is the only means available by which to redress the current imbalance in American arbitration law. The following recommendations are meant to add to or to modify the existing content of the FAA; those FAA provisions establishing a cooperative relationship between the judicial and arbitral process¹⁵¹ should be maintained. The recommendations are designed to integrate into the statute a statement of what arbitration is intended to be and what it can realistically accomplish in the dispute resolution setting. At its core, arbitration is a non-judicial mechanism for resolving disputes, chosen at the time of contracting, in an arms' length transaction between equally knowledgeable parties in the best interest of their transaction. The recommendations

severance of those parts of the award that are unaffected by the error. In terms of practical reality, this position ultimately leads to the exercise of perfunctory scrutiny. From a systemic standpoint, quashing this arbitral award on the ground that it exceeded the arbitrators' authority would have a number of substantial benefits for the American law of arbitration. It would reintegrate a sense of restraint into the development of the judicial doctrine on arbitration and signal that there is, after all, boundary to the expansionist policy. The courts could thereby serve notice that some essential legal protections still apply within the context of the alternative institution, that the content of the means of recourse remains relevant to the regulation of arbitral adjudicatory conduct. In effect, it would rehabilitate arbitration, rescuing it this time from the snare of exuberant judicial liberalism.

These supervisory powers could also be applied to other instances of manifest arbitrator deviation from minimal adjudicatory standards. For example, an arbitral tribunal may have unjustifiably refused to apply the stated law of the contract (thwarting the predictability of the parties' commercial agreement) or referred in its ruling only to part⁵ of the agreed-upon contractual provisions (thereby unnecessarily favoring the interests of one side). The exercise of court authority in such circumstances would not be an invitation to have judicial second-guessing of arbitral determinations, but rather would have these determinations conform to the contours of essential adjudicatory standards. Scrutiny would not penetrate to the merits of the determination as such, but would give renewed meaning to the notions of excess of arbitral authority and manifest disregard of the law.

151. See *supra* notes 5, 55-57 and accompanying text.

also attempt to create a more comprehensive statutory framework that regulates arbitration in both its domestic and international aspects. Finally, the following provisions are meant to remedy expressly the deficiencies of the Court's arbitration doctrine.

Proposed Amendments to the FAA

1. Arbitration agreements, whether in the form of an arbitral clause or a submission, are valid, irrevocable, and enforceable. Arbitration agreements may be entered into in either maritime or commercial transactions, in regard to obligations arising from contracts freely entered into by the contracting parties. The recourse to arbitration is founded upon the parties' exercise of their contractual freedom to consent to non-judicial forms of dispute resolution.

2. The validity of arbitration agreements may be challenged only upon the grounds ordinarily available for challenging contracts. These grounds include fraud, duress, coercion, mistake as to person, and generally adhesionary circumstances. Moreover, like a contract, an arbitration agreement can be declared void when it is fundamentally unfair and violates basic principles of equity.

3. In particular, an arbitration clause entered into in a consumer transaction where one party is more sophisticated than the other is presumed invalid. This presumption can be rebutted when the sophisticated party, relying upon the arbitral clause, can establish to a clear and convincing standard of proof that the party opposing the enforcement of the clause was fully informed of the arbitral clause's meaning and legal effect.

4. In the circumstances of a consumer transaction, a submission agreement is deemed an ordinary agreement and not subject to any presumptive disability, provided consent is freely and voluntarily given by the parties.

5. The government or government entities involved in maritime or commercial transactions have the capacity to enter into arbitration agreements. A valid agreement to arbitrate consented to by the government or government entity constitutes a waiver of sovereign immunity from suit and execution of judgment. Such an agreement has conclusive validity in international contracts and commercial arbitral proceedings.

6. The arbitration clause has legal autonomy and is independent of the principal contract. As a separable provision, the arbitration clause is not affected by the invalidity of the principal contract, unless the source of the nullity also implicates the arbitration clause.

7. Arbitrators have the adjudicatory power to rule upon challenges made to the scope or principle of their jurisdictional authority. As to the award of damages, arbitrators have the power to grant compensatory relief or other contractual remedies, such as liquidated damages. They lack the power to award extraordinary relief in the form of punitive or treble damages, unless the parties expressly authorize them to do so in the arbitral clause. Such authority can never be implied from the agreement.

ARBITRATION AND U.S. SUPREME COURT

8. Public policy matters cannot be the subject of an arbitration agreement or award. An agreement or award pertaining to a public policy matter is unenforceable. In cases involving both public policy and ordinary claims, the ordinary claims can be severed from public policy claims and the agreement or award is binding as to the former claims.

9. Cases involving the enforcement of fundamental statutory rights cannot be the subject of an arbitration agreement or of an arbitral proceeding. Fundamental statutory rights include those arising from antitrust statutes, the securities legislation, RICO, labor statutes, and other regulatory legislative frameworks deemed essential by Congress. Arbitral agreements or awards that pertain to international commercial arbitration or maritime arbitration are exempted from this prohibition. When statutory claims are alleged to be present in a domestic arbitration proceeding, the court may determine whether the statutory claims are unfounded and are being brought exclusively for a dilatory end to defeat the arbitration agreement. If the court finds the statutory claims to be both specious and dilatory, it will sever the statutory claims from the case and order the arbitration to take place in regard to the other claims. Such determinations will be made expeditiously and, in the court's discretion, may result in the assessment of civil fines against the dilatory party. Such fines shall not exceed 20% of the amount claimed in controversy.

10. An arbitral award may be vacated on the following grounds:

- (a) Where the award was procured by corruption, fraud, or undue means;
- (b) Where there was evident partiality or corruption in the arbitral tribunal;
- (c) Where the arbitrators misconducted the proceeding, resulting in the denial of basic procedural justice;
- (d) Where the arbitrators exceeded the adjudicatory powers conferred upon them in the terms of reference;
- (e) Where the award or part of it relates to a subject matter that cannot be submitted to arbitration;
- (f) Where the award violates public policy.
- (h) For purposes of this section, when an award contains an inarbitrable subject matter or violates public policy, those segments of the award, if any, which do not contravene these basic requirements may be severed and enforced. For purposes of this section, public policy refers to basic procedural regularity, concerns of fundamental fairness, and inviolable precepts of the legal order.

VI. CONCLUSION

The foregoing proposal constitutes an effective means of correcting the current excesses of the judicial doctrine on arbitration without jeopardizing arbitration's institutional status. The statutory provisions emphasize arbitration's traditional adjudicatory identity and allow it to seek its place in the contemporary landscape of dispute resolution with that iden-

tity firmly in place. A recent British statute¹⁵² shows the wisdom of using legislative correction as a means of establishing needed moderation between competing policies. The British legislation holds that submissions are the only form of arbitration agreements valid in consumer transactions. Binding recourse to arbitration can only be had when a dispute has already arisen. The rule is meant to avoid the glaring injustice of the *McMahon* and *Rodriguez* circumstances. Also, the Court's own decisional law in labor arbitration illustrates the utility and necessity of a meaningful inarbitrability defense in the law of arbitration. Statutory rights should be deemed either inarbitrable or subject to concurrent arbitral and judicial jurisdiction, with the courts having the last word. This is the only sensible way to deal with this important aspect of arbitration law.

Despite the preceding criticism and analysis, one misgiving remains. These recommendations and discussions are intended to be supportive and protective of arbitration. Arbitration has made and continues to make a substantial contribution to dispute resolution; without it, international commerce would be paralyzed, domestic commerce would not flow as freely, and labor conflicts might escalate. The view that arbitration is being manipulated for administrative and political ends may be distorted or an exaggeration. The criticism may fail to see that the Court is merely adapting arbitration to the evolving circumstances of a modern society and to its new vocation within that framework.

The reader is, of course, the final judge of the frailties of the author's judgment and sense of objectivity. Although one would like to believe that some benevolent rule of reason exists to explain the evident foibles of doctrine, the Court's conception of arbitration appears irremediably flawed. In this case, poetic redemption does not appear in the offing. The fallacies in the opinions are inescapable and cannot be retrieved: the question of whether statutory rights are arbitrable, first raised in the caselaw on international commercial arbitration, was integrated inappropriately into the domestic decisional law; the gravamen of the international rule was forgotten, making it possible for the Court to proclaim that statutory rights were arbitrable in all contexts; adhesionary circumstances and situations of manifest overreaching went unnoticed; prior distinctions and rules were reformulated without explanation and deceptively advanced as accepted fare; finally, the inarbitrability defense was written out of the American law of arbitration.

The doctrinal pathway traveled by the Court, punctuated by the landmarks of inconsistency, tortuous logic, and evident distortions, indi-

152. See *supra* note 101 and accompanying text.

ARBITRATION AND U.S. SUPREME COURT

cates that the Court is bent upon reaching a certain destination no matter how destructive the trek. It must find a refuge from the volume of litigation, a place where individual rights and public access to justice are outweighed by the values of efficiency and practicality. Whatever such a journey may portend for the future of the American political community, it has dire implications for the integrity of American arbitration law. An integrated, cohesive, and workable law of arbitration is not, for all the references to the policy underlying the FAA, a destination on the Court's map. Rather, arbitration is merely a vehicle of momentary convenience. The Court's patent misconceptions are born of an indifference to arbitration.

Despite the Court's efforts, the volume of litigation will probably continue to be overwhelming. American litigants, however, will probably not suffer lightly the restriction of their basic rights and the recourse to arbitration will become known as an ill-advised action. Unless legislation corrects the current situation, arbitration will be discredited and the Court will turn to another makeshift solution to its managerial woes, leaving the American law of arbitration in the ashes of its political, administrative, and doctrinal failure.

